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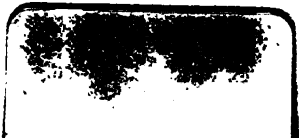
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TABLE OF CONTENTS.

ARTICLES.

	PAGE
AGREED VALUATION AS AFFECTING THE LIABILITY OF COMMON CARRIERS FOR NEGLIGENCE. <i>Henry Wolf Bihl</i>	32
COLLATERAL ATTACK ON INCORPORATION. B. IN GENERAL. <i>Edward H. Warren</i>	305
COMMON LAW AND LEGISLATION. <i>Roscoe Pound</i>	383
CONSTITUTIONAL QUESTIONS INVOLVED IN THE COMMODITY CLAUSE OF THE HEPBURN ACT. <i>William Draper Lewis</i>	595
CONTEMPT OF COURT, CRIMINAL AND CIVIL. <i>Joseph H. Beale</i>	161
CONTRIBUTORY NEGLIGENCE. <i>Francis H. Bohlen</i>	233
DUE PROCESS OF LAW AND THE EIGHT-HOUR DAY. <i>Learned Hand</i>	495
ENFORCEMENT OF A RIGHT OF ACTION ACQUIRED UNDER FOREIGN LAW FOR DEATH UPON THE HIGH SEAS. I, II. <i>G. Philip Wardner</i>	1, 75
EXPROPRIATION BY INTERNATIONAL ARBITRATION. <i>Charles Noble Gregory</i>	23
NON-CONTENTIOUS JURISDICTION IN GERMANY. <i>Walter Neitzel</i>	476
NOTE, TO THE NEXT STEP IN THE EVOLUTION OF THE CASE-BOOK. <i>Eugene Wambaugh</i>	118
REASONABLENESS OF MAXIMUM RATES AS A CONSTITUTIONAL LIMITATION UPON RATE REGULATION. <i>Frank M. Cobb</i>	175
RIGHT OF A STOCKHOLDER, SUING IN BEHALF OF A CORPORATION, TO COMPLAIN OF MISDEEDS OCCURRING PRIOR TO HIS ACQUISITION OF STOCK. <i>Murray Seabrook</i>	195
THE CLOG ON THE EQUITY OF REDEMPTION. <i>Bruce Wyman</i>	459
THE CONFUSION IN THE LAW RELATING TO MATERIALMEN'S LIENS ON VESSELS. <i>Fitz-Henry Smith, Jr.</i>	332
THE NEXT STEP IN THE EVOLUTION OF THE CASE-BOOK. <i>Albert Martin Kales</i>	92
THE ORIGIN OF USES AND TRUSTS. <i>James Barr Ames</i>	261
THE RELATION OF JUDICIAL DECISIONS TO THE LAW. <i>Alexander Lincoln</i>	120
THE TEST OF CONVERSION. <i>George Luther Clark</i>	408
UNIFORMITY OF LAW IN THE SEVERAL STATES AS AN AMERICAN IDEAL. I. CASE LAW, II. STATUTE LAW, III. CASE LAW VERSUS STATUTE LAW, IV. STATE COURTS VERSUS FEDERAL COURTS. <i>William Schofield</i>	416, 510, 519, 583
WHAT CONSTITUTES AN EXPRESS WARRANTY IN THE LAW OF SALES. <i>Samuel Williston</i>	555

INDEX-DIGEST.

References in heavy-faced type are to NOTES and REVIEWS; in plain type to RECENT CASES; and in italicized type to ARTICLES. Criticisms of articles in other publications are also indicated in the annual periodical index which follows this index.

A

ABUTTING OWNERS.

See *Highways; Municipal Corporations; Street Railways.*

ACCORD AND SATISFACTION.

See also *Payment.*

Validity: Lesser sum as satisfaction for a greater. 443

ADDITIONAL SERVITUDE.

See *Easements; Street Railways.*

ADJOINING LANDOWNERS.

See *Party Walls.*

ADMINISTRATION.

Of estates, see *Executors and Administrators.*

ADMIRALTY.

See also *Conflict of Laws; General Average; International Law; Maritime Liens; Salvage.*

Jurisdiction: Application to domestic vessels on the high seas of state statute giving right of action for death. 357, 363

Right of action for death properly within the scope of maritime law. 75-77

State police power over vessels within the three-mile limit. 357, 363

Test of locality of consummation of act: damage to bridge by steamer breaking from moorings. 536

See also *Conflict of Laws.*

Torts: Application to domestic vessels on the high seas of state statute giving right of action for death. 357, 363

Jurisdiction in action for damages to bridge caused by steamer breaking loose from her moorings. 536

Measure of damages: interest upon demurrage. 367

State police power over vessels within the three-mile limit. 357, 363

See also *Conflict of Laws.*

Decrees: When title to condemned prize passes. 55, 440

ADVERSE POSSESSION.

See also *Limitation of Actions.*

Nature of right of adverse possessor, see *Limitation of Actions.*

What constitutes: Holding under

an unrecorded deed from the true owner. 363

Subject-matter and extent of adverse possession: Possession adverse to grantor as breach of covenants of warranty and seisin. 628

Who may gain title: Grantee under an unrecorded deed from the owner. 363

Against whom title may be gained: Grantor by unrecorded deed. 363

Municipality. 292

Tenant in common under disability. 371

AFFIDAVITS.

See *New Trial.*

AGENCY.

See also *Arbitration and Award; Attorneys; Master and Servant.*

Scope of agent's authority: Agent for letting and sale, making sale to a tenant he has procured. 297

Misappropriating agent receiving return of the misappropriated funds with knowledge that a preference is intended. 141

Principal's liability to third persons in contract: Defense to contract obtained by bribery of the agent. 541

Principal's liability for acts of independent contractor: Negligence of foreman licensed under statute. 284

Agent's right against principal: Collection agent's right in funds from which he may deduct a commission. 287

Estate agent's rights to commission on sale by landlord to tenant whom agent has procured. 297

Leaving question of whether an estate agent procured a sale to the jury. 297

Agent's liability to third persons: Agent's liability for receiving preference in the course of his employment. 534, 538

Termination of authority: Agent

TABLE OF CONTENTS.

v

References in heavy-faced type are to NOTES and REVIEWS; in plain type to RECENT CASES; and in italicized type to ARTICLES. Criticisms of articles in other publications are also indicated in the annual periodical index which follows this index.

<p>for sale and letting, selling after he has made a lease. 297</p> <p>Effect of statutes on the relation:</p> <p>Constitutionality of Federal Employers' Liability Act. 290</p> <p>Failure to provide a safe place to work by a foreman licensed by statute. 284</p> <p>ALIENATION, RESTRAINTS ON.</p> <p>See under <i>Trusts</i>.</p> <p>ALIENS.</p> <p>Duty of allegiance when natural sovereign occupies country where alien resides. 64</p> <p>Enforcement by assignee of contract to convey land to alien. 363</p> <p>Preference given to local creditors by state courts. 537</p> <p>ALIMONY.</p> <p>See under <i>Divorce</i>.</p> <p>ALTERATIONS OF INSTRUMENTS.</p> <p>Legal effect, see <i>Wills</i>.</p> <p>ANIMALS.</p> <p>Property in animals: Mortgaged animals: ownership of off-spring. 443</p> <p>Damage to persons and chattels: Liability of carrier in the absence of negligence for injuries caused by wild animals during transportation. 441</p> <p>APPEAL AND ERROR.</p> <p>Effect of transfer of cause: Power to punish, pending appeal, violation of injunction. 444</p> <p>Power to punish violation of injunction revived by <i>superedeas</i>. 444</p> <p>ARBITRATION AND AWARD.</p> <p>Revocation of submission to arbitration by death of a party. 537</p>	<p>ARREST.</p> <p>See <i>Habeas Corpus</i>.</p> <p>ASSAULT AND BATTERY.</p> <p>Civil liability: Public service company liable for unauthorized insult by its servant. 58</p> <p>ASSESSMENT.</p> <p>See <i>Corporations (Individual liability to corporation and creditors); Taxation</i>.</p> <p>ASSIGNMENTS.</p> <p>See <i>Choses in Action; Landlord and Tenant</i>.</p> <p>ASSIGNMENTS FOR CREDITORS.</p> <p>See also <i>Bankruptcy</i>.</p> <p>Rights of creditors: Secured creditor's right to realize on security and receive a dividend on the whole claim. 280, 290</p> <p>ASSUMPSIT.</p> <p>Right to sue in <i>assumpsit</i> for tax. 283, 295</p> <p>ATTACHMENT.</p> <p>See also <i>Exemptions; Partnership</i>.</p> <p>Attachment of rolling stock of non-resident carrier. 59</p> <p>ATTORNEYS.</p> <p>See also <i>District and Prosecuting Attorneys</i>.</p> <p>Relation between attorney and client: Privileged communications, see under <i>Witnesses</i>.</p> <p>Privileges and duties attached to the office: Obligation to perform a bare promise made to client's former solicitors. 140</p> <p>AUTOMOBILES.</p> <p>For damage to automobile, see <i>Damages (Measure of damages)</i>.</p>
---	---

B

<p>BANKRUPTCY.</p> <p>State bankruptcy and insolvency laws: See <i>Insolvency</i>.</p> <p>Preferences: Holding in trust for creditor his claim which is subject to set-off. 141</p> <p>Personal liability of public officer for receiving preference in his public capacity when statute does not authorize him to be sued for such wrong. 534, 538</p> <p>Return of misappropriated funds through misappropriating agent. 141</p> <p>Transfer by broker of stock held on margin. 627</p> <p>Rights and duties of bankrupt:</p>	<p>Corporation held liable for libel after adjudication in bankruptcy. 366</p> <p>Right to effect composition before adjudication. 364</p> <p>Right to future earnings assigned before bankruptcy. 275, 285</p> <p>Title to property of bankrupt after adjudication and before appointment of trustee. 531, 538</p> <p>Powers and duties of trustee: Liability for negligent failure to collect outstanding asset. 441</p> <p>Return of payment to debtor paying in ignorance of set-off. 141</p> <p>Taking from bankrupt, property received from defendant in fraudulent</p>
--	---

References in heavy-faced type are to **NOTES** and **REVIEWS**; in plain type to **RECENT CASES**; and in italicized type to **ARTICLES**. Criticisms of articles in other publications are also indicated in the annual periodical index which follows this index.

- exchange, as a bar to recovering from defendant. 538
- Title to property of bankrupt after adjudication and before appointment of trustee. 531, 538
- Property passing to trustee**: Future earnings as property potentially possessed. 275, 285
- Goods pledged by the bankrupt but stored on his premises. 61
- Necessity that trustee authorize tax deed of property of bankrupt sold for taxes before adjudication. 441
- Property of bankrupt destroyed after adjudication and before appointment of trustee. 531, 538
- Dissolution of liens**: Effect of discharge upon an assignment of future wages. 275, 285
- Provable claims**: Anticipatory breach of contract. 364
- Claim pursued to judgment after the institution of proceedings. 214
- Judgment recovered more than a year and thirty days after the adjudication. 142
- Secured creditor's right to prove full claim after realizing on his security. 280, 290
- Priority of claims**: Infant's claim after avoidance of contract. 142
- Recovery by creditor who has made a payment to the bankrupt in ignorance of set-off. 141
- Partnership and individual claims and assets**: Priority of creditor of ostensible partnership over individual creditor. 292
- Exemptions**: Exemption of property extended to its proceeds. 213
- Discharge**: Effect upon an assignment of future earnings. 275, 285
- Obtaining money by false statement in writing preventing discharge. 537
- BANKS AND BANKING.**
- Officers and agents**: Liability of national bank director for report negligently made. 145
- Deposits**: Drawee's liability for paying check with forged indorsement. 214, 538
- National banks**: Federal usury statute protecting national banks. 136, 144, 451
- Liability of directors for report negligently made. 145
- Validity under federal statute of state tax on national bank shares without reduction for debts when other moneyed capital is taxed at higher rate but with reduction. 295
- BEQUESTS.**
- See *Legacies and Devises.*

- BIGAMY.**
- Common law marriage as affecting bigamy. 633
- BILLS AND NOTES.**
- Situs of note, see under *Conflict of Laws.*
- Negotiability**: Coupon bonds payable from joint stock companies' assets upon which stockholders are not liable. 441
- Indorsement**: Effect of fraudulent indorsement of check when payee was unknown to drawer. 214, 538
- Checks**: Acceptance by retention of check by the drawee. 626
- Effect of fraudulent indorsement of check when payee was unknown to drawer. 214, 538
- Purchasers for value without notice**: Validity of negotiable state bond stolen after redemption and before maturity and improperly not cancelled. 282, 294
- Validity of private negotiable bonds improperly circulated after redemption but before maturity. 282, 294
- Payment and discharge**: Validity of negotiable state bond stolen after redemption and before maturity and improperly not cancelled. 282, 294
- Validity of private negotiable bonds improperly circulated after redemption but before maturity. 282, 294
- Defenses**: Extension to principal not discharging surety who is joint maker. 55
- Delivery**: Failure of redelivery in case a negotiable bond is stolen after redemption and before maturity. 282, 294
- Statutes**: Federal usury statute making valid for national banks notes void under state law. 136, 144
- Negotiable Instruments Law: acts required to constitute acceptance. 626
- Surety who is joint maker not discharged when extension to principal. 55
- Validity under New York statute of usurious note taken with notice by state bank. 451
- Validity under New York statute of usurious note taken without notice by state bank. 136, 144
- Fictitious payee**: Effect of drawer's knowledge of the existence of the payee. 214, 538
- BILLS OF LADING.**
- See *Carriers; Interstate Commerce.*
- BILLS OF PEACE.**
- Jurisdiction of equity to avoid multiplicity of suits when one is arrayed against many. 208, 215

TABLE OF CONTENTS.

vii

References in heavy-faced type are to NOTES and REVIEWS; in plain type to RECENT CASES; and in italicized type to ARTICLES. Criticisms of articles in other publications are also indicated in the annual periodical index which follows this index.

BIOGRAPHY.

See *Legal Biography*.

BONDS.

Of corporations, see *Corporations* (*Corporate powers and their exercise*).

Of states, see *States*.

Validity of negotiable bonds improperly circulated after redemption but before maturity. 282, 294

BOUNDARIES.

Extension of city boundaries to piers built into navigable river. 364

Land on one side of a way of which grantor owns the whole. 146

Position of state boundary line after avulsion. 223

Position of state boundary line on a navigable river. 223

BOYCOTTS.

See *Torts*; *Trade Unions*; *Unfair Competition*.

BREACH OF MARRIAGE PROMISE.

Promise to marry after death of existing wife. 58, 369, 447

BROKERS.

Commission: Recovery in New York of interest in excess of six per cent paid by broker on money borrowed to purchase stock on margin. 638

Enjoining threatened sale by ticket brokers of non-transferable tickets. 365

Estate agent's right to commissions after letting, for a subsequent sale directly between the landlord and tenant. 297

Requiring brokers to show their books as an unconstitutional compulsion of criminal testimony. 621, 636

Stock carried on margin as constituting a pledge. 627

C

CANCELLATION OF INSTRUMENTS.

Cancellation of fraudulent birth certificate. 54, 58

CARRIERS.

See also *Constitutional Law*; *Interstate Commerce*; *Public Service Companies*; *Railroads*; *Street Railways*.

Federal regulation: See under *Interstate Commerce*.

State regulation in general: Carrier entitled to remunerative rates for particular services. 190-194

Compelling the running of a train which will not pay for itself. 49, 56

Computation of maximum rate for whole schedule. 183-186

Computation of maximum rate for portion of the business. 181-194

Constitutionality of state statute imposing large penalty for disregarding statutory rates whose reasonableness is not determined. 527, 540

Corporation bound by charter to comply with existing unconstitutional requirement as to rates. 216

Delegation of power to a commission to authorize increase of capital stock of railroad corporations. 205, 215

Methods of determining rates. 175-194

Duty to transport and deliver:

Carrier's loss of goods in transit constituting a tort at place of delivery. 539

Street railway enjoined from decreasing its service where *mandamus* would lie. 542

To carry goods not tendered when another part of the same shipment has been tendered. 143

To give notice before removing a spur track. 143

To run particular train which will not pay for itself. 49, 56

Custody and control of goods:

Liability of carrier transporting dangerous animals. 441

Loss or injury to goods: Fire non-negligently in car owned by shipper as an inherent defect in the goods. 627

Liability for consequential damages for conversion of goods delivered for transportation. 629

Limitation of Liability: Agreed valuation: general discussion. 32-46

Agreement as to value of goods shipped construed as a contract limiting liability. 32, 38

Breach of condition precedent by vessel owner as affecting express exemption in charter-party. 442

Estoppel as basis of limited liability in cases of agreed valuation. 35-38

Limitation of liability by agreed valuation when carrier knows valuation is false. 39-46

Connecting lines: Attachment of car

in the possession of a connecting carrier who has the right to use it when returning it. 59

Garnishment of connecting lines for freight collections due foreign carriers. 59

References in heavy-faced type are to NOTES and REVIEWS; in plain type to RECENT CASES; and in italicized type to ARTICLES. Criticisms of articles in other publications are also indicated in the annual periodical index which follows this index.

- Liability of initial carrier for damage occurring on connecting lines, when goods are received on a through bill and at a through rate. 539
- Separate charges of connecting carriers on a through shipment, constituting a through rate. 142
- Discrimination and overcharge:**
Distribution of cars without counting cars not owned by the carrier. 442
- Recovery by shipper after reduction of rate by the Interstate Commerce Commission. 59
- Tickets:** Enjoining threatened sale by ticket broker of non-transferable tickets. 365
- Sleeping-cars:** Statute providing the upper berth when unoccupied should be closed if occupant of lower berth so requested. 372
- CHARITIES AND TRUSTS FOR CHARITABLE USES.**
Rights and liabilities of charitable organizations: Basis of exemption of university property from taxation. 617, 634
- Liability to taxation of land leased from a university. 617, 634
- CHARTER-PARTY.**
See *Contracts*.
- CHattel MORTGAGES.**
See also *Pledges*.
Rights of intervening creditors:
Rights when mortgagor has power to sell part of the mortgaged property. 285
- After-acquired property:** Rights to off-spring of mortgaged animals. 443
- CHECKS.**
See under *Bills and Notes*.
- CHOSES IN ACTION.**
See *Conflict of Laws*; *Garnishment*.
What may be assigned: Future wages. 275, 285
- Manner and effect of assignment:**
Assignment of future wages creating lien potentially existing. 275, 285
- COLLATERAL ATTACK.**
On status of corporation, see *Corporations (Corporation de facto)*.
- COLLEGES AND UNIVERSITIES.**
Basis of exemption of university property from taxation. 617, 634
- Liability to taxation of land leased from university. 617, 634
- COMBINATION.**
See *Conspiracy*; *Interstate Commerce*; *Restraint of Trade*; *Torts*; *Trade Unions*; *Unfair Competition*.
- COMMERCE.**
See *Interstate Commerce*.
- COMMISSION.**
Of brokers, see *Brokers*.
- COMMISSIONS.**
See *Constitutional Law (Separation of powers)*.
- COMPOSITION WITH CREDITORS.**
See *Bankruptcy (Rights and duties of bankrupts)*.
- CONDITIONS PRECEDENT.**
Non-performance as a defense, see *Contracts*.
- CONFLICT OF LAWS.**
See also *Federal Courts*.
Extent of governmental power:
Basis of jurisdiction over torts on the high-seas: in general. 9-22
- Consent to application of foreign maritime law which concerns matters not generally recognized as maritime. 16, 17
- Consent to application of foreign maritime law which differs from the general maritime law by decision or statute. 15-21
- Effect of confiscation of a trade-mark in one country upon its use in another country. 361, 373
- General maritime law consisting only of the law of separate maritime states. 11, 12
- Governmental power of the President in the canal zone after expiration of the authority given him by Congress. 547
- International law as a limit to legislative power. 394-396
- Jurisdiction of United States Court for China. 437, 447
- Jurisdiction over torts on the high seas based upon citizenship of defendant. 3-6
- Maritime jurisdiction independent of control of person or *res* based upon consent to maritime law of any state. 9-15
- Natural law as a limitation on legislative power. 390-393
- Need of international agreement to allow one country to take property in another. 23-31
- Presumption that death due to collision on the sea occurred on the vessel. 2, 3
- Restraining and enforcing extraterritorial acts. 354, 365
- State ordering the production of books kept in another state. 354, 365
- See also *Admiralty*.

TABLE OF CONTENTS.

ix

References in heavy-faced type are to NOTES and REVIEWS; in plain type to RECENT CASES; and in italicized type to ARTICLES. Criticisms of articles in other publications are also indicated in the annual periodical index which follows this index.

Recognition of foreign judgments:

Effect at the situs of a foreign decree for conveyance of land as alimony. 210, 221

Effect at the situs of a foreign decree for performance of a contract to convey land. 210, 221

Equitable decree as a cause of action in another state. 210, 221

Validity of decrees in admiralty resting on jurisdiction to apply the maritime law of the forum independently of the control of person or res. 15-22

Concurrent jurisdiction: Effect of state laws upon maritime rights. 357, 363

Jurisdiction of federal court to grant *habeas corpus* after commitment by state court for act done under order of federal court. 204, 220

Jurisdiction of United States Court for China. 437, 447

Nature of jurisdiction of United States court in foreign countries. 437, 447

Power of state to dissolve corporation whose property is in the hands of federal receiver. 279, 293

State control of property in a federal receiver's hands, when a state court has jurisdiction of a different action concerning the same property. 279, 293

Situs of choses in action: Apportionment of inheritance tax on stock of corporation incorporated in several states. 295

Garnishment of foreign insurance company doing business in the state, when the beneficiary of the policy is absent. 219, 289

Notes owned outside the state. 50, 63

Situs for probate duty of deceased partner's interest in a firm whose partners do not live where the firm does business. 221

Personal jurisdiction: Compelling foreign corporation doing business in the state to produce books kept in another state. 354, 365

Consent as basis. 285

Consent implied by entering a partnership. 285

Garnishment of foreign insurance company doing business in the state, when beneficiary is absent. 219, 289

Restraining and enforcing extraterritorial acts. 354, 365

Unreasonable service by publication upon domestic corporation. 453

Unreasonable service on agent of

foreign corporation doing business in the state. 453

Unreasonable service on agent of foreign corporation which has ceased to do business in the state. 453

Jurisdiction for divorce: Necessity for a matrimonial domicile. 296

Remedies: right of action: Foreign decree for conveyance of land as evidence of a right of action at situs. 210, 221

Redress for tort committed under statute of foreign state which forbade recovery outside that state. 207, 215

Redress in one jurisdiction for tort committed in another. 207, 215

Remedies: procedure: Foreign decree for conveyance of land as alimony. 210, 221

Capacity: Competency of witness convicted of felony in another state. 547

Effect of domicile on capacity of married woman to contract. 55

Marriage: Nullification: jurisdiction in case of marriage in England between English woman and French minor. 365

Validity of marriage in England between English woman and French minor not having consent required by French law. 365

Legitimacy and adoption: Jurisdictional requirement for legitimation subsequent to birth. 443

Legitimation by marriage subsequent to birth by state where parent and child are domiciled but where parents are not married for purposes outside the state. 443

Where parent and child have different domiciles. 443

Rights in property: Effect at situs of foreign decree for conveyance of land as alimony. 210, 221

Effect at situs of foreign decree for performance of contract to convey land. 210, 221

Effect of confiscation of trade-mark in one country upon its use in another country. 361, 373

Situs of the property right in trade-mark. 361, 373

Testamentary succession: Administration of trust of personality created by will in one state, *cestui*, trustee, and property being in another state. 143

Apportionment of inheritance tax on stock of corporation incorporated in several states. 295

Effect of the intent of the testator. 143

Situs of deceased partner's interest in

References in heavy-faced type are to NOTES and REVIEWS; in plain type to RECENT CASES; and in italicized type to ARTICLES. Criticisms of articles in other publications are also indicated in the annual periodical index which follows this index.

firm whose partners do not live where the firm does business. 221

Obligations ex delicto: creation and enforcement: Application of state statute giving right of action for death, to domestic vessels on the high seas. 357, 363

Constitutionality of statute allowing enforcement of foreign action for death only when deceased is citizen of forum. 285

Failure of carrier to deliver goods at destination on account of loss in transit, constituting a tort at place of delivery. 539

Recognition in admiralty of foreign rights accruing under laws different from those of forum. 8

Recognition of foreign-acquired right of action for death, not against public policy in forum not allowing such action. 78-81

Recognition of foreign-acquired right of action for death on high seas when both parties are citizens at the forum. 82-92

Recognition of foreign-acquired right of action for death on the high seas when both parties are citizens of the same foreign country. 82-92

Recognition of foreign-acquired right of action for death on the high seas when only one party is a citizen at the forum. 82-92

Recognition of foreign-acquired right of action for death on the high seas when the parties are citizens of different foreign countries. 82-92

Redress for tort committed under the statute of foreign state which forbade recovery outside that state. 207, 215

Right of action for death on high seas created by the maritime law of any maritime state independently of the citizenship of the parties. 9-22

Right of action for death resulting from injuries received outside the state where death occurred. 143

Right to prefer local creditor of alien to alien creditor, resting on discretion to entertain suits between foreigners. 537

State police power over vessels within three-mile limit. 357, 363

Making and validity of contracts: Contract to convey land valid where made and invalid at the situs. 365

Effect of domicile on capacity of married woman to become liable for rent. 55

Validity of a contract as basis for decree for conveyance of foreign land. 210, 221

Rights and obligations of foreign corporations: See *supra*, *Personal jurisdiction, Situs of choses in action; and Corporations (Foreign corporations)*.

CONSIDERATION.

See also *Illegal Contracts*.

Theories of consideration: Accord and satisfaction by part payment. 443

Consideration void in part: Validity of contract in which one of several acts promised by one party is *malum prohibitum*. 549

Validity of contract in which one of several acts promised by one party is unenforceable under the statute of frauds. 549

Validity of contract in which one party promises to do a criminal and a non-criminal act. 549

CONSPIRACY.

See also under *Unfair Competition*.

Civil liability: Necessity of intent to injure plaintiff. 546

Criminal liability: Combination of theatre managers to exclude a critic. 144

CONSTITUTIONAL LAW.

See also *Aliens; Carriers; Conflict of Laws; Elections; Eminent Domain; Extradition; Federal Courts; Habeas Corpus; Interstate Commerce; Municipal Corporations; Police Power; States; Taxation*.

Nature and development of constitutional government: Law governing rights of states in interstate river. 132, 144

Law governing state's right to injunction against individual for nuisance committed in another state. 132, 144

State's power to compel acts in another state by consent implied through entering the Union. 354, 365

State's power to forbid water from streams to be carried outside state in pipes. 627

Validity of interstate agreement to allow one state to condemn property in another state. 30-31

Construction, operation, and enforcement of constitutions: Judicial construction of the phrase "public purpose." 277, 295

Necessity that the purpose of taxation be public. 277, 295

See also under *Elections*.

Who can set up unconstitutional: Claim of unconstitutionality

TABLE OF CONTENTS.

xi

References in heavy-faced type are to **NOTES** and **REVIEWS**; in plain type to **RECENT CASES**; and in italicized type to **ARTICLES**. Criticisms of articles in other publications are also indicated in the annual periodical index which follows this index.

barred absolutely through estoppel by lapse of time.	133, 145	Jurisdiction to grant <i>habeas corpus</i> after a commitment by a state court for an act done under a federal court order.	204, 220
Corporation barred by accepting with its charter obligation of unconstitutional statute.	216	More than enumerated powers granted.	47, 56
Corporation which has assented to unreasonable service by taking franchise or doing business in the state.	453	Power to declare unconstitutional imposition levied for regulation, not revenue.	455
Nature of the interest necessary to raise the question.	438, 444	Statute authorizing state judiciary to recount and re-canvass ballots.	138, 145, 216
Public officer having no direct interest appealing from state court.	438, 444	Impairment of the obligation of contracts: Granting bridge franchise after ferry franchise.	368
Separation of powers: Delegation of legislative power to commissions.	205, 215	Recourse to federal court denied to a foreign corporation induced to do business in the state.	215
Delegation of power to commission to authorize the increase of capital stock of railroad corporations.	205, 215	Due process of law: Act forbidding payment of wages in tickets exchangeable for goods.	56
Delegation of power to committee of political party to establish districts for choice of delegates.	215	Allowing only larger parties to vote at official primaries.	622, 630
Granting municipality power outside its territorial limits.	149	Act requiring certain classes of corporations to pay employees weekly in money.	444
Limitations on legislative power otherwise than by the constitution.	390-407	Allowing boarding-house keepers a lien on property not belonging to guest.	147
Power of legislature to put interrogatories in aid of a constitutional function.	431, 448	Application of Fifth Amendment to legislative, as distinguished from executive action.	602-604
Statute authorizing the judiciary to recount and re-canvass ballots.	138, 145, 216	Computation of maximum rate for a portion of the business.	181-194
Usurpation of legislative powers by judiciary in interpreting the phrase "public purpose."	277, 295	Computation of schedule of maximum rates for the whole business.	183-186
Usurpation of legislative powers by judiciary in requiring the purpose of taxation to be public.	277, 295	Constitutionality of clause in Hepburn Act forbidding interstate railroads to carry their own goods.	601-616
Powers of the executive: Governmental power of the President in the canal zone after expiration of the authority given him by Congress.	547	Constitutionality of rate regulation.	175-194
Powers of Congress: money: Exclusive federal control over national banks.	136, 144, 451	Deducting from compensation for land taken by eminent domain, benefits conferred on land remaining to owner.	368
Making valid for national banks notes void under state law.	136, 144, 451	Effect of precedent in determining expediency of a statute with regard to its constitutionality.	500-501
Powers of Congress: territories: Effect of federal power over public lands, on a state's sovereignty.	47, 56	Expediency as a test of due process of law.	495-500
Powers of Congress: implied powers: Exclusive power to legislate for the reclamation of large tracts of public lands.	47, 56	Fifth Amendment limiting acts of Congress other than those concerning administration of justice.	605-606
Power to put interrogatories in aid of a constitutional function.	431, 448	Fifth Amendment requiring mere compliance with express constitutional provisions.	604-605
Powers of the judiciary: Federal court enjoining state officer from enforcing unconstitutional state statute regulating rates.	527, 540	Forbidding the display of advertisements on the outside of public omnibuses.	445
		Granting municipality power outside its territorial limits.	149

References in heavy-faced type are to NOTES and REVIEWS; in plain type to RECENT CASES; and in italicized type to ARTICLES. Criticisms of articles in other publications are also indicated in the annual periodical index which follows this index.

- Legislative authorization of unreasonably high gas rates. 56
- Limiting the uses to which property may be put, as a taking of property without due process of law. *606-608*
- National Arbitration Act forbidding the discharge of workmen because of membership in union. 370
- Power of state to declare its redeemed negotiable bonds void so that later holders in due course shall be unprotected. 282, 294
- Power to regulate rates compared with the police power as justification for federal limitation upon the uses to which carriers may put their property. *609-610*
- Prohibition of contract by vendor of patented article restricting the use of articles to be used with the patented article. 62
- Prohibition of night work by women in factories. 62
- Railroad compelled to run train which will not pay for itself. 49, 56
- Reasonableness of the eight-hour law as a test of its constitutionality. *500-509*
- Requiring railroad to close unoccupied upper berth if occupant of lower berth so requests. 372
- Right of a court to hold unconstitutional on the ground of inexpediency a statute which the legislature has reasonably regarded as expedient. *500-509*
- Right to hearing on validity of tax assessment. 285
- State statute imposing large penalty on railroads for disregarding statutory rates whose reasonableness is not determined. 527, 540
- Surrender by one state to another of a criminal not a fugitive from justice. 224
- Ten-hour law for women in factories. 544
- Unreasonable service on agent of foreign corporation doing business in the state. 453
- Unreasonable service on agent of foreign corporation which has ceased to do business in the state. 453
- Unreasonable service by publication on domestic corporation. 453, 539
- See also *Taxation*.
- Trial by jury:** Constitutionality of punishment for contempt without trial by jury. *171-174*
- Waiver of jury trial by plea of not guilty. 212, 216
- Waiver of jury trial in criminal cases. 212, 216
- Vested rights:** Right to service of gas company at reasonable rate. 56
- Enforcement of judgments:** Validity at the situs of foreign decree for conveyance of land. 210, 221
- See also *Conflict of Laws*.
- Personal rights: civil, political, and religious:** Freedom to contract: requiring corporations to pay employees weekly in money. 444
- Freedom to contract: statute forbidding payment of wages in tickets exchangeable for goods. 56
- National Arbitration Act forbidding the discharge of workmen because of membership in union. 370
- Prohibition of contract by vendor of patented article restricting the use of articles to be used with the patented article. 62
- Prohibition of night work by women in factories. 62
- Reasonableness of the eight-hour law as a test of its constitutionality. *500-509*
- Requiring brokers to show their books as an unconstitutional compulsion of criminal testimony. 621, 636
- Statute making it a misdemeanor for farm laborer receiving pay in advance wilfully to fail to work. 628
- Surrender by one state to another of a criminal not a fugitive from justice. 224
- Ten-hour law for women in factories. 544
- Local self-government:** Statute giving state commissioner same power as district attorney to enforce liquor laws. 540
- Privileges and immunities: class legislation:** Act allowing private claim against state. 443
- Allowing enforcement of foreign action for death only when deceased was citizen of forum. 285
- Allowing only larger parties to vote at official primaries. 622, 630
- Forbidding payment of wages in tickets exchangeable for goods. 56
- Legislation requiring only corporations to produce books. 366
- Local creditors preferred to aliens by state courts. 537
- Prohibition of night work by women in factories. 62
- Requiring certain classes of corporations to pay employees weekly in money. 444
- Statute making it a misdemeanor for farm laborer receiving pay in advance wilfully to fail to work. 628

References in heavy-faced type are to NOTES and REVIEWS; in plain type to RECENT CASES; and in italicized type to ARTICLES. Criticisms of articles in other publications are also indicated in the annual periodical index which follows this index.

CONSTRUCTION.

Of deeds, see under *Deeds*.

Of wills, see under *Wills*.

CONSTRUCTIVE TRUST.

See also *Quasi-Contracts; Trusts (Cy près doctrine)*.

Breach of fiduciary relation: Liability of a director dealing with the corporation. 51, 56

Misconduct of non-fiduciaries: Effect of co-devisee's promise made to prevent alteration of a will, upon other co-devisees. 286

Liability of innocent parties: Effect of co-devisee's promise made to prevent alteration of a will, upon other co-devisees. 286

Imposition of a constructive trust on account of a mistake. 434, 453

CONSULAR COURTS.

See *International Law*.

CONTEMPT.

Acts and conduct constituting contempt: Insults to the court directly or indirectly preventing the administration of justice. 162-164

Insults to the king or governmental process. 161-162

Publication of inaccurate report of court decision. 366

Refusal to obey a chancery decree under the king's seal. 166-169

Refusal to obey the command of the king. 164-166

Violation of an injunction against a nuisance on certain land by grantees ignorant of the injunction. 220

Power to punish for contempt: Advisability of trial by jury in cases of criminal and civil contempt. 171-174

Power of appellate court after reviving a decree by *supersedeas*. 444

Power of appellate court to punish violation of an injunction pending appeal. 444

Punishment of criminal contempt distinguished from coercing obedience after civil contempt of a command. 160-174

CONTINGENT REMAINDERS.

See *Vested, Contingent, and Future Interests*.

CONTRACTS.

See also *Accord and Satisfaction; Admiralty; Arbitration and Award; Assumpsit; Bills and Notes; Carriers (Tickets); Choses in Action; Colleges and Universities; Constitutional Law; Illegal Contracts; Insurance; Theatres*.

Construction of contracts: Effect of exception of holidays from time stipulated for loading vessel, when work is done on holidays. 217, 540

Effect of provision in contract for verification by one party on his right to sue for deceit. 218

See also under *Insurance*.

Defenses: non-performance by plaintiff: Effect of breach of condition precedent by owner upon the limitation of liability in a charter-party. 442

See also *Statute of Frauds*.

Anticipatory breach: Election of anticipatory breach as foundation of claim in bankruptcy. 364

Suits by third persons not parties to the contract: Effect of *Lawrence v. Fox* on New York law. 426-430

Discharge of contracts: See *Accord and Satisfaction; Payment*.

CONTRIBUTION.

See *General Average; Joint Wrongdoers*.

CONTRIBUTORY NEGLIGENCE.

See also *Master and Servant (Assumption of risk); Negligence*.

In general: Doctrine of last clear chance. 238-242, 250-260

Proximity of legal causation as basis of the defense. 234-242

Rule denying contribution between joint tortfeasors as basis of defense. 242-243

Theoretical basis of the defense. 233-260

Voluntary assumption of risk as basis of defense. 243-251

Statutory actions: Negligence of beneficiary affecting action for death by wrongful act. 636

Imputed negligence: Imputing negligence of parent to child in parent's suit for death of child. 636

CONVERSION.

See *Equitable Conversion; Trover and Conversion*.

COPYRIGHTS.

Effect of assignee's failure to mark as copyrighted, the original picture. 286

CORPORATIONS.

See also *Bankruptcy; Colleges and Universities; Conflict of Laws; Municipal Corporations; Public Service Companies; Quo Warranto; Receivers; Taxation*.

Nature of corporation: Act of administrative officer of a corporation

References in heavy-faced type are to NOTES and REVIEWS; in plain type to RECENT CASES; and in italicized type to ARTICLES. Criticisms of articles in other publications are also indicated in the annual periodical index which follows this index.

- as a corporate act *per se*, not the act of an agent of the corporation. 535, 541
- Corporations at common law. 308
- Possibility of corporate action, though unauthorized, without legal incorporation. 305-309, 317-319
- Recognition by the state of acts of body assuming to act as corporation without legal authority. 309-311
- Distinction between corporation and its members:** Effect of a restrictive trade agreement made by one corporation upon a new corporation composed of the same stockholders. 445
- Capital, stock, and dividends:**
- Delegation of power to commission to authorize the increase of capital stock of railroad corporations. 205, 215
- Implied warranty in the sale of stock that the corporation is not merely *de facto*. 294
- Liability of stockholder for assessment for preliminary expenses when all the stock has not been subscribed. 540
- See also *Brokers*.
- Charters: grant, construction and amendment:** Acceptance of charter as consent to unreasonable service. 453, 539
- Acceptance of charter including submission to existing unconstitutional statute. 216
- Dissolution of corporation by bankruptcy. 366
- Requiring railroads to make alterations when a highway is opened across the right of way. 288
- Statute requiring corporation to pay employees weekly in money. 444
- See also *Constitutional Law*.
- Charters: repeal and forfeiture:** Power of state to dissolve a corporation where property is held by a federal receiver. 279, 293
- See also *Franchises*.
- Corporations de facto:** Collateral attack upon corporation acting after expiration of its charter. 325, 330
- Collateral attack on corporation lacking general requisites of *de facto* corporation in case the intent to act as corporation was unknown. 326
- Collateral attack on corporation organized under law not providing for such a corporation. 316-319, 323, 329
- Collateral attack on corporation organized under unconstitutional law. 314-315, 322, 329
- Collateral attack upon corporation organized without good faith. 323-325, 329-330
- Collateral attack upon corporation acting without any authority. 325, 330, 331
- Implied warranty in sale of stock that the corporation is not merely *de facto*. 294
- Individual liability of associates who have formed recognized *de facto* corporation. 322
- Liability of associate who has not ratified or authorized the acts of corporation which has not general requisites of *de facto* corporation. 326
- Liability of associates who have contracted as corporation but have failed for various reasons to be even *de facto* corporation. 311-315, 320-329
- Recognition by the state of acts of body assuming to act as corporation without legal authority. 309-311
- Right of associates when sued as corporation to set up their illegal organization. 331
- Right of banking corporation lacking even general requisites of *de facto* corporation to sue on contract. 316
- Right of corporation lacking even general requisites of *de facto* corporation to sue on contract. 315-319, 329-331
- Corporate powers and their exercise:** Implied warranty in sale of bonds when issues are all or in part unauthorized. 294
- Directors and other officers:** Act of administrative officer of a corporation as a corporate act *per se* not the act of an agent of the corporation. 535, 541
- Director's right to salary when he holds in trust the shares he is required to hold as director. 217, 366
- Liability for reports negligently made. 145
- Mandamus** to compel state's attorney to bring statutory *quo warranto* to oust one unlawfully usurping office in private corporation. 371
- Right in general to deal with the corporation. 51, 56
- Right to buy corporation's property at execution sale. 51, 56
- Stockholders: rights incident to membership:** Federal rule of procedure that stockholder suing in behalf of corporation must have owned stock at time of wrong. 198-203

TABLE OF CONTENTS.

xv

References in heavy-faced type are to NOTES and REVIEWS; in plain type to RECENT CASES; and in italicized type to ARTICLES. Criticisms of articles in other publications are also indicated in the annual periodical index which follows this index.

Necessary <i>bona fides</i> of stockholder suing in behalf of corporation. 197	COURTS.
Necessity that other remedies be exhausted before stockholder may sue on behalf of corporation. 196	See also <i>Constitutional Law; Contempt; Federal Courts; Fury; Law; New Trial; Trials.</i>
Right of stockholder suing in behalf of corporation to complain of misdeeds prior to his acquisition of stock. 195-203	Constitutional powers of courts, see <i>Constitutional Law.</i>
Stockholders: individual liability to corporation and creditors:	Extraterritorial courts, see <i>International Law.</i>
Liability of stockholder for assessment for preliminary expenses when all stock has not been subscribed. 540	Relations of state and federal courts, see under <i>Federal Courts.</i>
Ultra vires: what acts are ultra vires: Displaying advertising signs upon the outside of public omnibuses. 445	Advisability of courts taking less hostile attitude toward legislation. 403-407
Ultra vires: effects of: Assignment of franchise to an individual who in turn assigns to a corporation. 57	Defects of judge-made law. 384
Right of a corporation to enjoin municipal interference with advertisements whose display is <i>ultra vires.</i> 445	Friction between a statute and principles of common law as a limitation of legislative power. 396-403
Torts and crimes: Action by corporation for slander of its former officer. 60	Jurisdiction and procedure of German courts. 481-485
Dissolution: Corporation held liable for libel after adjudication in bankruptcy. 366	Jurisdiction on holidays. 628
Foreign corporations: Apportionment of inheritance tax on stock of corporation incorporated in several states. 295	Validity of acts of court officers when the court does not exist <i>de jure.</i> 153
Collateral attack upon corporation acting without authority outside its own state. 323	COVENANTS OF TITLE.
Compelling foreign corporation doing business in the state to produce books kept in another state. 354, 365	Covenant of seisin: Possession adverse to grantor as breach of covenant of seisin. 628
Constitutionality of state tax on foreign insurance company for benefit of disabled firemen. 277, 295	Covenant of warranty: Possession adverse to grantor as breach of covenant of warranty. 628
Doing business in state as assent to unreasonable service. 453	COVENANTS RUNNING WITH THE LAND.
Garnishment of foreign corporation doing business in state, when principal debtor is absent. 219, 289	See also <i>Landlord and Tenant; Restrictions and Restrictive Agreements as to Use of Property.</i>
Inducing foreign corporation to do business in state, a contract not to deny recourse to federal courts. 215	Covenant concerning the land only by indirectly affecting its value. 291
Unreasonable service on agent of foreign corporation which has ceased to do business in state. 453	COVERTURE.
See also <i>Constitutional Law.</i>	See <i>Husband and Wife.</i>
CO-TENANCY.	CREDITORS.
See <i>Tenancy in Common.</i>	Assignments for, see <i>Assignment for Creditors.</i>
COUNTERCLAIM.	Rights of, see <i>Fraudulent Conveyances; Husband and Wife; Partnership.</i>
See <i>Set-off and Counterclaim.</i>	CRIMINAL LAW.
	See also <i>Conspiracy; Corporations; Extradition; Homicide.</i>
	Procedure: Federal court's right to imprison to enforce a sentence imposing a fine. 145
	Necessity of plea when defendant has consented to proceed to trial. 217
	Waiver of jury trial by plea of not guilty. 212, 216
	Statutory offenses: Elements necessary to constitute a lottery. 148
	Obtaining reduced rates by false billing, a complete offense before transportation. 135, 147, 542

References in heavy-faced type are to NOTES and REVIEWS; in plain type to RECENT CASES; and in italicized type to ARTICLES. Criticisms of articles in other publications are also indicated in the annual periodical index which follows this index.

- Receiving illegal concessions from published rates a continuing crime. 135, 147, 542
- Requirement of *mens rea* in criminal conviction under the Safety Appliance Act. 294
- Jurisdiction:** Receiving illegal concessions from published rates punishable wherever the goods are transported. 135, 147, 542.
- Trial:** Waiver of jury trial by plea of not guilty. 212, 216
- Sentence:** Federal court's right to imprison to enforce a sentence imposing a fine. 145
- CROPS.**
- Damages for breach of warranty of seed when only part of the crop grows. 286
- CY PRES DOCTRINE.**
- See under *Trusts*.

D

DAMAGES.

- See also *Eminent Domain (Compensation)*; *General Average*; *Proximate Cause*.
- Measure of damages:** Breach of warranty of seed when only part of crop grows. 286
- Contract insuring against fire building about to be destroyed as nuisance. 631
- Diminution of selling value of estate arising from fear of further subsidence. 367
- Infringement of patent for which owner has an established license fee. 293
- Interest upon demurrage. 367
- Recovery of interest when general license is measure of damages for infringement of patent. 293
- Rental value as measure of damages for injury to automobile used for pleasure only. 445
- Trover for conversion of goods in transit. 629
- Consequential damages:** Consequential damage for conversion of goods in transit. 629
- Diminution of selling value of estate arising from fear of further subsidence. 367
- Mental anguish resulting from exclusion from dance hall because of being dressed in naval uniform. 541
- Prospective damages:** Value of whole crop when only part had grown. 286

DANGEROUS PREMISES.

- Liability to trespassers:** Child trespassers on turntable. 57
- Liability to licensees:** Validity of contract exempting railroad from statutory liability for loss by fire. 289

DE FACTO CORPORATIONS.

See under *Corporations*.

DEATH BY WRONGFUL ACT.

- See *Conflict of Laws (Obligations ex delicto)*.
- Statutory liability in general:** Constitutionality of statute allowing enforcement of foreign right only when deceased was citizen of forum. 285
- Foreign-acquired right of action for death not against public policy in forum not allowing such action. 78-81
- Right of action for death as properly within the scope of maritime law. 75-77
- Time of accrual of action. 143
- Jurisdiction to create right of action for death on high seas, and enforcement of such foreign-acquired rights, see *Conflict of Laws*.
- Defenses to statutory liability:** Contributory negligence of the beneficiary. 636

DEBT.

- See also under *Municipal Corporations*.
- Discharge of, see *Bankruptcy*.
- Right to sue for a tax as for a debt. 283, 295.

DECEIT.

- General requisites and defenses:** Effect of a provision in a contract for verification of its statements on the right to sue for deceit. 218
- Negligence as substitute for intentional untruth:** Abstract of title to realty negligently prepared. 439, 449
- General liability for negligent use of language. 439, 449
- Liability of national bank directors for a report negligently made. 145

DEDICATION.

- Nature and scope:** Effect of dedica-

References in heavy-faced type are to NOTES and REVIEWS; in plain type to RECENT CASES; and in italicized type to ARTICLES. Criticisms of articles in other publications are also indicated in the annual periodical index which follows this index.

tion upon the crown taking by escheat.	151	DENTISTS.	
Necessity that dedication be for an absolutely unlimited term.	151	See <i>Evidence (Judgments)</i> .	
Power of a lessee to dedicate his term.	151	DESCENT AND DISTRIBUTION.	
Essential elements of dedication:		See also <i>Executors and Administrators; Taxation</i> .	
Rights of electric railway on crossing impliedly dedicated by a railroad.	629	Function of a German probate court in determining on heir.	489-491
Validity when conditions precedent and subsequent are imposed by dedicat.	356, 367	Right of child legitimate by foreign law different from law of situs.	443
Validity when dedicator imposes limitations inconsistent with public user.	356, 367	Right of heir of disseisor to maintain ejectment without having had possession.	375
Effect of: Condition in dedication of highway that abutters be free from assessment for its improvement, construed as a covenant.	356, 367	Time of vesting of title as determining liability to inheritance tax.	435, 450
Rights of electric railway on crossing impliedly dedicated by railroad.	629	Will of one who died without heirs contested by state claiming right of escheat.	452
Validity of conditions precedent and subsequent imposed by dedicat.	356, 367	DIRECTORS.	
Validity of limitations inconsistent with public user, imposed by dedicat.	356, 367	See <i>Banks and Banking; Corporations</i> .	
Misuser and abandonment: Validity of conditions subsequent as covenants.	356, 367	DISCHARGE.	
Validity of limitations imposed by dedicat and inconsistent with public uses.	356, 367	See under <i>Bankruptcy; Contracts</i> .	
DEEDS.		DISSEISIN.	
See also <i>Recording and Registry Laws</i> .		See also <i>Adverse Possession</i> .	
Construction and operation in general: Proving an undelivered deed to be a will by parol evidence of <i>animus testandi</i> .	451	General nature and effect of disseisin: Right of heir of disseisor to maintain ejectment without having had possession.	375
Parties: Grantor and grantee the same person.	57	DISTRIBUTION.	
Insane persons as parties, see <i>Insane Persons</i> .		See <i>Descent and Distribution</i> .	
Boundaries: See <i>Boundaries</i> .		DISTRICT AND PROSECUTING ATTORNEYS.	
DELIVERY.		Constitutionality of statute authorizing state officer to enforce liquor laws in all counties.	540
Of bonds, see <i>Bonds</i> .		DIVORCE.	
		See also <i>Conflict of Laws</i> .	
		Charge of divorce as libel, see <i>Libel and Slander</i> .	
		Alimony: Right to modify a decree which adopted a separation agreement.	146
		DOMICILE.	
		See <i>Conflict of Laws</i> .	

E

EASEMENTS.

See also <i>Franchises; Highways; Party Walls; Railroads; Restrictions and Restrictive Agreements as to Use of Property; Street Railways</i> .	
Nature and classes of easements:	
Nature of an easement as property right limited to a determined purpose.	359, 368
Modes of acquisition: prescription: Interruption of adverse user	

by building third track on elevated railway.

Prescription against tenants in common, one of whom is under a disability.

Extinguishment and revival: Basis of rule that easement is merely suspended by unity of seisin in estates of different duration.

Basis of rule that unity of ownership extinguishes an easement.

References in heavy-faced type are to **NOTES AND REVIEWS**; in plain type to **RECENT CASES**; and in italicized type to **ARTICLES**. Criticisms of articles in other publications are also indicated in the annual periodical index which follows this index.

- Effect under the Prescription Act of unity of ownership where possession is in tenant for years. 359, 368
 Effect of unity of ownership where the possession is in tenant for years. 359, 368
- EJECTMENT.**
 Bill of peace to avoid numerous actions. 208, 215
- ELECTIONS.**
 Constitutionality of act entitling only larger parties to vote at primaries. 622, 630
 Constitutionality of statute authorizing the judiciary to recount and re-canvas ballot. 138, 145, 216
 Constitutionality of voting machine under provision for written vote. 287
 Constitutionality of taxation for official primary elections. 622, 630
 Delegation of power to committee of political party to establish districts for choice of delegates. 215
 Estoppel by lapse of time to set up unconstitutionality of a statute defining election districts. 133, 145
 Indorsement of ballots by rubber stamp when initials of judge are required. 287
- ELECTRICITY.**
 See *Highways*; *Street Railways*; *Telegraph and Telephone Companies*.
- ELEVATED RAILROADS.**
 See *Street Railways*.
- EMBEZZLEMENT.**
 Appropriation by collection agent of funds from which he may deduct his commission. 287
- EMINENT DOMAIN.**
 See also *Interstate Commerce*.
Nature of the right of eminent domain: Need of international agreement to allow one country to take property in another. 23-31
 Right of one nation to take land in another country. 28-29
 Right of one state to condemn property in another state. 25-28, 30-31
What property may be taken: Federal government taking state land. 25
 Property within an embassy. 25
When is property taken: Condemning easement which has already been used for the prescriptive period, against tenants in common, one of whom was under disability. 371
 Land taken which is subject to an executory devise. 218
- Land which is subject to restrictive agreement. 139, 146
Compensation: For land which was subject to restrictive agreement. 139, 146
 Rights of executory devisee when property is taken before his interest has vested. 218
 Right of tenant in common who was under disability when the easement taken had been used for the prescriptive period. 371
 Set-off of benefits conferred on land remaining to owner. 368
- EMPLOYERS' LIABILITY ACTS.**
 See under *Master and Servant*.
- EQUITABLE CONVERSION.**
 Time of conversion when property is to be sold after the termination of a particular estate. 288
 Whether right to surplus after sale of deceased's land is realty or personalty. 630
- EQUITABLE EASEMENTS.**
 See *Restrictions and Restrictive Agreements as to Use of Property*.
- EQUITABLE MORTGAGE.**
 See under *Mortgages*.
- EQUITY.**
 See also *Bills of Peace*; *Conflict of Laws*; *Constructive Trusts*; *Equitable Conversion*; *Husband and Wife (Wife's separate estate)*; *Injunctions*; *Mortgages*; *Quasi-Contracts*; *Receivers*; *Restrictions and Restrictive Agreements as to Use of Property*; *Specific Performance*; *Trusts*; *Uses*.
Jurisdiction: Bill to avoid multiplicity of suits when one is arrayed against many. 208, 215
 Cancellation of fraudulent birth certificate. 54, 58
 Enjoining nuisance against state when damages would be adequate. 132, 144
 Imposition of constructive trust on account of mistake in will. 434, 452
 Jurisdiction by consent or estoppel. 368, 446
 Jurisdiction by contract of the parties. 446
 Perpetual restraint of continuing trespass not causing irreparable damage in favor of one whose right by long possession is uncertain. 220
 Protection of other than property rights. 54, 58
 See also under *Conflict of Laws*.
Procedure: Effect of appeal upon the power to punish for contempt. 444

References in heavy-faced type are to NOTES and REVIEWS; in plain type to RECENT CASES; and in italicized type to ARTICLES. Criticisms of articles in other publications are also indicated in the annual periodical index which follows this index.

ESCHEAT.

See *Descent and Distribution*.

ESTOPPEL.

Estoppel in pais: Acceptance of charter estopping corporation to set up unconstitutionality of existing statute. 216

Cestui estopped by trustee's misrepresentation. 53, 64

Effect of estoppel upon the right to attack collaterally corporation which lacks the general requisites of a *de facto* corporation. 312-315

Equity jurisdiction conferred by estoppel. 368, 446

Estoppel as basis of validity of agreement as to valuation, which operates as limitation of carrier's liability. 35-38, 39-46

Estoppel by lapse of time to set up unconstitutionality of statute defining election districts. 133, 145

Municipality estopped by mere laches. 292

EVIDENCE.

See also *Law and Fact*; *Parol Evidence Rule*; *Presumptions*; *Wills*; *Witnesses*.

Hearsay: in general: Applicability of rule in showing existence of newly discovered evidence as ground for new trial. 449

Declarations concerning matters of public or general interest: Proceedings of lunacy inquisition. 289

Proceedings of statutory medical council. 289

Judgments: Decision of a lunacy inquisition. 289

Decision of a statutory medical council as to registry of a dentist. 289

Documents. See under *Parol Evidence Rule*.

EXECUTION.

See also *Exemptions*.

Director's right to buy corporation's property at execution sale. 51, 56

Sheriff's possession of articles secretly placed in receptacle after execution. 64, 223

EXECUTORS AND ADMINISTRATORS.

See also *Conflict of Laws*; *Descent and Distribution*; *Legacies and Devises*; *Taxation*.

Appointment and tenure of office: Termination of authority of administrator *durante absentia*, by death of principal administrator. 147

Rights, powers, and duties: Disposition of lease in spite of covenant not to assign. 60

Administration: Power of executor to apply the assets in avoidance of succession tax. 435, 450

Probate procedure without an administrator in Germany. 489-491

Right of secured creditor after realizing on his security to receive dividend on his whole claim from insolvent estate. 280, 290

Set-off of debt of original legatee against the heir substituted by statute to prevent a lapse. 291

See also *Conflict of Laws*.

Proceedings by or against. See *Death by Wrongful Act*.

Sales and conveyances under order of court: Application of statute barring action for void administrator's sale, to holder of reversion in property. 543

EXECUTORY DEVICES.

See *Vested, Contingent, and Future Interests*.

EXEMPTIONS.

See also under *Bankruptcy*; *Taxation*.

Effect of fraudulent removal by debtor of part of his property. 219

EXTRADITION.

Interstate extradition under the United States Constitution:

Rendition of a criminal who has left the state after dismissal of former indictment for same offense. 541

State's power to surrender a criminal not a fugitive from justice. 224

F**FEDERAL COURTS.**

Jurisdiction and powers in general: Appeal to federal court by official not directly affected by state statute. 438, 444

Common law right to imprison to enforce a sentence imposing a fine. 145

Enjoining state officer from enforcing unconstitutional state statute regulating rates. 527, 540

Jurisdiction to grant *habeas corpus* after commitment by state court for act done under a federal court order. 204, 220

Necessity that stockholder suing in

References in heavy-faced type are to **NOTES** and **REVIEWS**; in plain type to **RECENT CASES**; and in italicized type to **ARTICLES**. Criticisms of articles in other publications are also indicated in the annual periodical index which follows this index.

- behalf of corporation own stock at the time of the wrong. 198-203
 What constitutes a controversy under statute granting jurisdiction in cases of controversy. 446
Jurisdiction based on diversity of citizenship: Possibility of waiver of fact that neither party resides in the district of the federal court to which case is removed from state court. 630
Relations of state and federal courts: Effect of the doctrine of constructive possession upon the enforcement by a state of right against property of which a federal receiver has lost control. 433, 446
 Right of state court to establish claim against property which a federal receiver has sold on condition that certain claims against it be paid by the purchaser. 433, 446
 State control of property held by federal receiver when state court has jurisdiction of another suit concerning the same property. 279, 293
 Tendency of this relation to produce uniformity of state law. 587-594
Powers as to unconstitutional statutes: Appeal to federal court by official not directly affected by state statute. 438, 444
 Enjoining state officer from enforcing unconstitutional state statute regulating rates. 527, 540
 Power to declare unconstitutional imposition levied for regulation, not revenue. 455
FELLOW SERVANTS.
 See under *Master and Servant*.
FERRIES.
 See *Franchises*.
FICTITIOUS PAYEE.
 See under *Bills and Notes*.

FIDUCIARY RELATIONS.

See *Corporations (Directors and other officers)*; *Mortgages*; *Trusts*.

FIRES.

See under *Railroads*.

FOREIGN COMMERCE.

See *Interstate Commerce*.

FOREIGN CORPORATIONS.

See *Constitutional Law*; *Corporations (Foreign corporations)*.

FRANCHISES.

See also under *Street Railways*.

Effect of assignment to individual who reassigns to corporation. 57

Enforcing by *mandamus* duties assumed by telephone company in accepting its franchise. 448

Power to permit private persons to build spur track from street. 221

Power to revoke indirectly by granting competing franchise. 368

FRAUD.

See *Bills and Notes*; *Constructive Trusts*; *Deceit*; *Equity (Jurisdiction)*; *Exemptions*; *Fraudulent Conveyances*.

FRAUDS, STATUTE OF.

See *Statute of Frauds*.

FRAUDULENT CONVEYANCES.

Voluntary transfers: Time of accrual of action for conveyance before marriage in fraud of dower. 632

What constitutes fraud: Chattel mortgage with power of sale in the mortgagor. 285

Pledge of property stored on pledgor's premises. 61

Rights of creditors: Rights under a mortgage of wagons and stock, fraudulent as to the stock. 285

FUGITIVE FROM JUSTICE.

See *Extradition*.

G

GARNISHMENT.

See also *Conflict of Laws*.

Persons subject to garnishment: Connecting carrier, for freight collections due non-resident carrier. 59

Property subject to garnishment.
 See *Conflict of Laws*.

GENERAL AVERAGE

Nature, cause, and manner of sacrifice: Effect of inherent vice of

cargo upon the right to contribution. 369

GOOD WILL.

Effect of restrictive agreement made by one corporation upon a new corporation composed of the same stockholders. 445

GUARDIAN AND WARD.

Appointment of guardian in German courts. 488-489

TABLE OF CONTENTS.

xxi

References in heavy-faced type are to NOTES and REVIEWS; in plain type to RECENT CASES; and in italicized type to ARTICLES. Criticisms of articles in other publications are also indicated in the annual periodical index which follows this index.

H

HABEAS CORPUS.

- Effect of escape after service of writ. 219
- Jurisdiction of federal court to issue writ after commitment by state court for act done under order of federal court. 204, 220
- Jurisdiction of federal courts to issue writ to relieve from commitment by state court. 204, 220

HARSAY EVIDENCE

See under *Evidence*.

HIGHWAYS.

See also *Dedication*; *Easements*; *Eminent Domain*; *Municipal Corporations*.

Establishment. See *Dedication*.

Rights and remedies of abutters: Compensation for alterations required by statute when highway is opened across railway. 288

Injunction against private spur track from street railway. 221

Additional servitudes: Interurban electric railroad carrying freight. 58

HOMICIDE.

Locality of offenses: Death in one state resulting from injuries in another. 143

HUSBAND AND WIFE.

See also *Breach of Marriage Promise*; *Conflict of Laws*; *Divorce*; *Marriage*.

Property acquired by husband and

wife: Application of doctrine of tenancy by entireties to personality. 446

Rights of wife against husband and in his property: Time of accrual of action for conveyance before marriage in fraud of dower. 632

Rights and liabilities of husband as to third parties: Effect of married women's property acts on husband's liabilities for torts of wife. 631

Contracts between husband and wife: Separation agreements: right to modify a decree for alimony which adopted the agreement. 146

Privileges and disabilities of coverture: Effect of married women's property acts on wife's liability for her torts. 631

Liability of wife's separate estate on contract of suretyship under statutes allowing married women to contract. 619, 631

Wife's separate estate: Effect of married women's property acts on wife's separate estate. 631

Liability of wife's separate estate on contract of suretyship, in general. 619, 631

Liability of wife's separate estate on contract of suretyship under statutes allowing married women to contract. 619, 631

I

ILLEGAL CONTRACTS.

See also *Husband and Wife*; *Lotteries*; *Restraint of Trade*; *Usury*.

Contracts supported by an illegal or immoral consideration: Contract in which one of several acts promised by one party is *malum prohibitum*. 549

Contract in which one party promises to do a criminal and a non-criminal act. 549

Contracts collaterally related to something illegal or immoral: Contract for sale of goods secured by agreement to pay bonus to agent. 541

Insurance against fire of building about to be torn down as public nuisance. 631

Contracts against public policy: Agreement as to value of goods

shipped construed as contract limiting liability. 32, 38

Contract clogging equity of redemption. 459-475

Contract made to cause breach of existing contract. 290

Exempting railway from statutory liability for loss by fire. 289

Insurance against death at the hands of justice or by suicide. 530, 542

Promise to marry after death of existing wife. 58, 369, 447

See also *Restraint of Trade*.

Effect of illegality: See *Quasi-Contracts*.

IMPLIED CONTRACTS.

See *Quasi-Contracts*.

IMPORTS.

See *Interstate Commerce*.

INDEBITATUS ASSUMPSIT.

See *Assumpsit*; *Debt*.

References in heavy-faced type are to NOTES and REVIEWS; in plain type to RECENT CASES; and in italicized type to ARTICLES. Criticisms of articles in other publications are also indicated in the annual periodical index which follows this index.

INDEPENDENT CONTRACTOR.

See *Agency*.

INDICTMENT AND INFORMATION.

See *Criminal Law (Procedure)*.

INFANTS.

See also *Parent and Child*.

Contracts and conveyances: Priority in bankruptcy of infant's claim after avoidance of contract. 142

Unborn children: Cases in which testamentary gift to class includes child *en ventre sa mère*. 360, 369

INHERITANCE.

See *Descent and Distribution*.

INJUNCTIONS.

See also *Contempt; Equity*.

Nature and scope of remedy:

Effect of injunction against maintaining nuisance on certain land on later grantees ignorant of the injunction. 220

Perpetual injunction in favor of one whose rights by adverse possession are not certain. 220

Street railway enjoined from decreasing service when *mandamus* would lie. 542

Acts restrained: Continuing trespass not causing irreparable damage permanently restrained though plaintiff's legal right is uncertain. 220

Enforcement of state statute imposing large penalty upon railway for disregarding statutory rates whose reasonableness is not determined. 527, 540

Inducing sale in violation of vendor's contract with plaintiff. 451

Infringement of patent very near expiration. 544

Municipal action to prevent the use of outside of omnibuses for advertisements. 445

Nuisance against state when damages would afford adequate remedy. 132, 144

Sale of copies of artistic creation by *bona fide* purchaser from wrongdoer. 634

Threatened sale of non-transferable railroad tickets by ticket broker. 365

Use of fraudulent birth certificate. 54, 58

INNKEEPERS.

Duties to travellers and guests: Contracting to allow but one telephone company in hotel. 62

Liability for unauthorized insult by innkeeper's servant. 58

Innkeepers' lien: New York statute construed as allowing keepers of

inns and boarding-houses liens on property not belonging to guests. 147

INSANE PERSONS.

See also *Limitation of Actions*.

Adjudication of insanity: Admissibility of adjudication as evidence in a civil suit. 289

Guardianship and protection: Termination by death of lunatic. 147

Property and conveyances: How deeds should be set aside. 631

INSOLVENCY.

See also *Bankruptcy; Executors and Administrators; Receivers*.

Merger of claim in judgment against corporation after the institution of insolvency proceedings. 214

Right of secured creditor after realizing on security to receive dividend for whole claim from assignee for creditors. 280, 290

Right of secured creditor after realizing on his security to receive a dividend on his whole claim from an insolvent estate. 280, 290

INSURANCE.

State control of insurance companies: Constitutionality of tax on foreign fire insurance company for benefit of disabled firemen. 277, 295

Constitutionality of tax on local fire insurance companies for the benefit of disabled firemen. 277, 295

Garnishment of foreign insurance company doing business in state, when beneficiary is absent. 219, 289

Insurable interest: Ownership of building about to be torn down as nuisance. 631

Defenses of insurer: Death of insured at hands of justice avoiding policy which makes no express provision for such avoidance. 530, 542

Suicide of insured when no express provision for avoidance on that ground. 530, 542

That building insured was public nuisance. 631

Construction and operation of conditions: Change of interest in property by owner's adjudication in bankruptcy before the appointment of trustee. 531, 538

Construction of particular words and phrases in standard forms: Contraband of war, military officers as. 636

Rights of beneficiary: Rights of beneficiary when insured meets death at hands of justice or by suicide. 530, 542

TABLE OF CONTENTS.

xxiii

References in heavy-faced type are to **NOTES** and **REVIEWS**; in plain type to **RECENT CASES**; and in italicized type to **ARTICLES**. Criticisms of articles in other publications are also indicated in the annual periodical index which follows this index.

Amount of recovery: Damages for loss by fire if building was about to be torn down as public nuisance. 631	Control by Congress: Application of Safety Appliance Act to independent intrastate carrier of goods in transit from another state. 447
Accident insurance: Failing to meet requirement of immediate notice of accident in employers' liability insurance. 370	Authorizing existing corporation to build an interstate bridge without consent of the states. 147
Marine insurance: Wreck of prize after capture as loss by peril of the sea. 55, 440	Constitutionality of clause in Hepburn Act forbidding interstate railroads to carry their own goods. 597-601
Mutual benefit insurance: Effect of invalid change of beneficiary upon rights of original beneficiary. 278, 290	Distribution of cars without counting cars not owned by carrier as constituting discrimination. 442
Remedy in equity for defective change of beneficiary. 278, 290	Elkins Act: effect of special saving clause in the Hepburn Act. 223, 545
INTEREST.	Elkins Act: receiving illegal concessions from published rates a continuing crime. 135, 147, 542
See <i>Bills and Notes; Damages; Usury.</i>	Federal Employers' Liability Act. 290
INTERNATIONAL LAW.	Fixing the respective charges of connecting carriers for a through shipment not under a joint rate. 142
See also <i>Admiralty; Conflict of Laws; Sovereigns.</i>	Forbidding carrier to transport articles of interstate commerce in which it has an interest, as a regulation. 595-601
Nature and extent of sovereignty: International law as limit to legislative power. 394-396	Offense of obtaining reduced rates by false billing complete before transportation. 135, 147, 542
Nature of jurisdiction of United States Court for China. 437, 447	Putting interrogatories in the course of regulating interstate commerce. 431, 448
Need of international agreement to allow one country to take property in another. 23-31	Regulation of capital of interstate railway as an instrumentality of interstate commerce. 431, 448
Territorial jurisdiction in wide bays, over three miles from shore. 65	Requirement of <i>mens rea</i> for criminal conviction under the Safety Appliance Act. 294
See also <i>Conflict of Laws.</i>	Sherman Anti-Trust Law applied to labor union boycotting goods manufactured for interstate trade. 450
Privileges and immunities of sovereigns in foreign countries: Action by trustee process against railway owned by foreign sovereign. 545	Control by states: Application of general privilege tax to wagons engaged in interstate commerce. 618, 634
Legations and diplomatic agents: Right to take by eminent domain property within embassy. 25	Application of general property tax to wagons engaged in interstate commerce. 618, 634
Treaties: Nature of jurisdiction of United States Court for China under treaty of 1858. 437, 447	Attachment of rolling stock of non-resident carrier and garnishment of connecting carrier for freight collections. 59
INTERSTATE COMMERCE.	Compelling railway to run a particular train as long as there is no loss on the whole intrastate business. 49, 56
What constitutes interstate commerce: Independent intrastate railroad carrying goods in transit from another state. 447	License tax on peddlers of frames who also sell portraits. 632
Interstate bridges. 147	Proceeds of sale of foreign imports, retained temporarily in the bank to meet small expenses, taxed as property employed in business. 353, 373
Telegram sent to a navy yard under exclusive federal jurisdiction. 59	Taxing while in original packages
Transportation by a railroad of property which it owns but is not going to use in its business as carrier. 598-601	
Traveling on one ticket between points within one state, upon a journey to a point outside the state. 370	
Wagons employed in transporting interstate articles from depot to consignees. 618, 634	

References in heavy-faced type are to NOTES and REVIEWS; in plain type to RECENT CASES; and in italicized type to ARTICLES. Criticisms of articles in other publications are also indicated in the annual periodical index which follows this index.

- articles of interstate and foreign commerce. 353, 373
Interstate commerce commission:
 Power of the Commission to propound interrogatories. 431, 448
 Recovery by shipper after reduction of rate by the Commission. 59

INTOXICATING LIQUORS.

- Validity of covenant not to sell liquor on certain land when taken to create monopoly. 450

IRRIGATION.

- See *Eminent Domain; Waters and Watercourses.*

J

JOINT STOCK COMPANY.

- See under *Partnerships.*

JOINT TENANCY.

- Collection agent's right in funds from which he may deduct commission. 287

- Effect of joint devisee's promise made to prevent alteration of a will, upon other joint devisees. 286

JOINT WRONGDOERS.

- Contribution, general discussion. 242-243

- Rule denying contribution between joint tort-feasors as basis of defense of contributory negligence. 242-243

JUDGMENTS.

- See also under *Conflict of Laws; Evidence.*

- Operation as bar to other actions:**
 Merger of claim against insolvent corporation in judgment obtained after the institution of insolvency proceedings. 214

- Foreign judgments:** See under *Conflict of Laws.*

JURISDICTION.

- See *Conflict of Laws; Courts; Equity; Federal Courts; International Law.*

JURY.

- See *Constitutional Law (Trial by jury); Criminal Law (Trial); Law and Fact; New Trial; Trial.*

L

LABOR UNIONS.

- See *Trade Unions.*

LANDLORD AND TENANT.

- Nature and incidents of the relation:** Effect upon easement of unity of ownership when possession is in tenants for years. 359, 368

- Terms for years:** Dedication by lessee. 151

- Trustee's power to lease for term that may extend beyond trust term. 211, 223

- Conditions and covenants in leases:** Against assignment: effect in general on devise. 60

- Effect on devise to executors on trust and their conveyance to themselves as trustees. 60

- Effect on transfer by administrator in settling estate. 60

- Covenant concerning the land only by indirectly affecting its value. 291

- Assignment and subletting:** Dedication by lessee as an assignment. 151

- Distrain by landlord on goods of sublessee not engaged in public trade. 291

- Rent:** Distress on goods of a sublessee not engaged in public trade. 291

LAW.

- Advantages of case law over statute law. 519-521

- Distinction between contentious and non-contentious jurisdiction. 476-479

- Effect of tendency of legislature to follow previous statutes, upon uniformity of law. 517-519

- Evil of multiplying precedents. 416-419

- Influence of the bar on legislation. 516-519

- Influence of public opinion on legislation. 510-519

- Need of following principles rather than precedents to gain uniformity in American case law. 425-430

- Non-contentious or administrative jurisdiction in Germany. 476-495

- Relation of common law and legislation. 383-407

- Relation of state and federal courts as a tendency to uniformity of state law. 583-594

- Relations of judicial decisions to law. 120-129

- Sources of law. 122-125

- Tendency of study of cases to advance uniformity of law. 521-522

- The law as an existing abstract entity. 120-129

References in heavy-faced type are to NOTES and REVIEWS; in plain type to RECENT CASES; and in italicized type to ARTICLES. Criticisms of articles in other publications are also indicated in the annual periodical index which follows this index.

LAW AND FACT.

Provinces of court and jury: Question for court: whether sale was procured by estate agent. 297

LEASES.

See *Landlord and Tenant*.

LEGACIES AND DEVISES.

See also *Conflict of Laws (Testamentary succession)*; *Equitable Conversion*; *Executors and Administrators*; *Vested, Contingent, and Future Interests*; *Wills*.

Title and rights of devisees and legatees; Renunciation of title avoiding inheritance tax. 435, 450

Time of vesting of title as determining liability to inheritance tax. 435, 450

General liability of legatees and devisees: Effect of co-devisee's promise made to prevent alteration of a will upon other co-devisees. 286

Particular instances of construction: See under *Wills*.

Lapsed bequests and devises: Effect of lapse of previous estate upon executory devise when contingency has not happened. 451

Set-off of debt of original legatee against the heir substituted by statute to prevent a lapse. 291

Void or voidable bequests and devises: Devise of lease in spite of covenant not to assign. 60

Abatement: Legacy in satisfaction of a liquidated debt. 60

Legacy in satisfaction of an unliquidated debt. 60

LEGAL BIOGRAPHY.

Note on death of E. H. Strobel. 275

LEGITIMACY.

See also *Conflict of Laws (Legitimacy and adoption)*.

Domiciliary requirements for present legitimation and legitimation by relation back by marriage subsequent to birth. 443

LIBEL AND SLANDER.

Acts and words actionable: Charging institution of divorce proceedings in state where incompatibility is ground for divorce. 448

Defamation of plaintiff's sister. 448

Suit by corporation because of defamation of its former officer. 60

LIENS.

See also *Chattel Mortgages*; *Maritime Liens*.

Assignment of future earnings creating lien potentially existing. 275, 285

New York statute construed to allow keepers of inns and boarding-houses liens on property not belonging to guests. 147

LIFE ESTATES.

Life estate in machinery devised with other property. 635

Right to excess of interest obtained by trustee's unauthorised investment, as between life tenant and remainderman. 546

Time of accrual of action by owner of future interest in personality, for conversion by holder of life interest. 542

LIMITATION OF ACTIONS.

See also *Adverse Possession*.

Nature and construction of statute: Application to reversioner of statute barring action for property sold by administrator. 543

Effect of disability caused by the injury for which the action is brought. 148

Accrual of action: Action accruing on day after the injury. 148

Action by owner of future interest in personality for conversion by holder of life interest. 542

Conveyance before marriage in fraud of dower. 632

Operation and effect of bar by limitation: Application to municipalities. 298

Effect on co-tenant under disability. 371

Perpetual injunction in favor of one whose title by adverse possession has not been legally determined. 220

LITERARY PROPERTY.

See *Title, Ownership, and Possession*.

LORD CAMPBELL'S ACT.

See *Death by Wrongful Act*.

LOTTERIES.

Statutes: Elements necessary to constitute the crime. 148

Element of chance when calculation would be possible if competitor knew the necessary facts. 148

References in heavy-faced type are to NOTES and REVIEWS; in plain type to RECENT CASES, and in italicized type to ARTICLES. Critics of articles in other publications are also indicated in the annual periodical index which follows this index.

M

MAIL.

See *Post-Office*.

MALICIOUS PROSECUTION.

Probable cause: Effect of *bona fide* mistake of law. 146

MANDAMUS.

Persons subject to mandamus: Committee of political party entrusted with ministerial duties. 215

Acts subject to mandamus: Enforcement of statute the constitutionality of which defendant questions. 438, 444

Performance of duties assumed by telephone company in accepting its charter. 448

Refunding state bond valid by law merchant, but not intended to be so by legislature. 282, 294

State's attorney compelled to bring *quo warranto*. 371

Street railway enjoined from decreasing its service although *mandamus* would lie. 542

MANSLAUGHTER.

See *Homicide*.

MARINE INSURANCE.

See under *Insurance*.

MARITIME LAW.

See *Admiralty*.

MARITIME LIENS.

Nature and scope: Authority of Congress to legislate with regard to maritime liens. 351-352

Claims giving rise to liens: Basis of rule against implying lien for necessities furnished at home port. 332-337

Basis of rule that only master can give implied lien for necessities. 332-337

Dependency of lien for necessities upon benefit they conferred or contract under which they are furnished. 345-349

Lien for necessities furnished at request of charterer. 344-345

Lien for necessities furnished in foreign port at request of owner or his agent. 337-339

Lien for necessities furnished in home port at request of owner or his agent. 339-344

Need of reforming law allowing liens for necessities furnished vessel. 332-352

Time of accrual of liens:

Whether lien arises when necessities

are contracted for or when they are furnished. 347-349

MARKETABLE TITLE.

See *Specific Performance*.

MARRIAGE.

See also *Breach of Marriage Promise*; *Conflict of Laws*; *Husband and Wife*; *Legitimacy*.

Creation of the relation: Common law marriage as affecting bigamy. 633

MARRIED WOMEN.

See *Husband and Wife*.

MASTER AND SERVANT.

See also *Agency*; *Constitutional Law*; *Innkeepers*.

Duty of master to provide safe appliances: Negligence of foreman licensed under statute, in allowing coal to fall from mine roof. 284

Requirement of *mens rea* for criminal conviction under the Safety Appliance Act. 294

Fellow servant and vice principal doctrine: Character of foreman licensed under statute. 284

Employers' liability acts: Constitutionality of federal Employers' Liability Act. 290

MASTERS OF VESSELS.

See *Maritime Liens*.

MERGER.

See *Judgments* (*Operation as bar to other actions*).

MINES AND MINING.

See also *Support*, *Right of*.

Mine-owner's liability for negligence of foreman licensed under statute. 284

MISTAKE.

See *Quasi-Contracts*.

As ground for altering wills, see *Wills*.
Effect of mistake of law on the existence of probable cause, see under *Malicious Prosecution*.

MONOPOLIES.

See under *Restraint of Trade*.

MORTGAGES.

See also *Chattel Mortgages*.

Nature and effect of mortgage: Fiduciary relation between mortgagor and mortgagee. 465, 467-470

Equitable mortgages: Equitable mortgagee who relied on misrepresentation of trustee, postponed to the *cestui*. 57, 64

TABLE OF CONTENTS.

xxvii

References in heavy-faced type are to NOTES and REVIEWS; in plain type to RECENT CASES; and in italicized type to ARTICLES. Criticisms of articles in other publications are also indicated in the annual periodical index which follows this index.

Equity of redemption: Clogging equity of redemption, in general. 459-475	Purchase money mortgage not constituting debt. 149
Limiting in the mortgage the time or manner of redemption. 459-460	Liability for torts: Liability to voluntary spectator damaged by permitted exhibition of fire-works in street. 543
Option to purchase given mortgagee found to be clog on equity of redemption. 462-463	Franchises and licenses: Enforcing by <i>mandamus</i> duties assumed by telephone company in accepting its franchise. 448
Sale and option for re-purchase as clog on an equity of redemption. 460-462	Power to permit private persons to build spur track from street. 221
Validity of a collateral advantage to mortgagee in mortgage. 468-473	Officers and agents: Constitutionality of municipal appropriation to reimburse officers for liability for illegal acts committed in the course of duty. 625, 633
Validity of conveyance of equity of redemption from mortgagor to mortgagee after mortgage. 464-468	Personal liability for receiving preference for municipality, when statute does not authorize officer to be sued for such a wrong. 534, 538
Validity of covenant in mortgage advantageous to mortgagee and imposing burden on mortgagor after mortgage. 473	Validity of acts when corporation does not exist <i>de jure</i> . 153, 449
Transfer of right and property: Validity of conveyance of equity of redemption from mortgagor to mortgagee after mortgage. 464-468	Assessments for local improvements: Conclusiveness of finding of city council that a railroad's right of way is so benefited as to be subject to assessment. 292
Foreclosure: Authority to give deed after mortgagor's bankruptcy when foreclosure proceedings were instituted before bankruptcy. 441	Effect of condition in dedication of a highway, that abutters be free from assessment for its improvement. 356, 367
Mortgagor's right to surplus in hands of first mortgagee. 61	Nature of special assessments. 533, 546
See also <i>Receivers</i> .	Set-off against an award for property condemned. 368
MUNICIPAL CORPORATIONS.	Special assessment for street sprinkling. 533, 546
Proceedings of council or other governmental body: Requirement that ordinance be read three times, not satisfied by third reading before newly elected board. 371	Actions by and against municipal corporations: Municipality bound by statute of limitations. 292
Territorial limits and subdivisions: Extension of city boundaries over piers built into navigable river. 364	Municipality estopped by mere laches. 292
Granting municipality power outside its territorial limits. 149	MURDER.
Municipal debts and contracts: City bonds payable solely out of income of newly created street railway, constituting debt. 149	See <i>Homicide</i> .
	MUTUAL BENEFIT SOCIETIES.
	See under <i>Insurance</i> .

N

NATIONAL BANKS.	NEGLIGENT MISREPRESENTATION.
See under <i>Banks and Banking</i> .	In general: Cases in which liability has been imposed. 439, 449
NEGLIGENCE.	Particular cases: Abstract of title to realty negligently prepared. 439, 449
See also <i>Agency; Animals; Bankruptcy; Carriers; Contributory Negligence; Negligent Misrepresentations; Proximate Cause; Trusts</i> .	NEGOTIABLE INSTRUMENTS.
Duty of care: Duty of municipal corporation to spectator of exhibition of fireworks in street. 543	See <i>Bills and Notes; Corporations (Capital, stock, and dividends)</i> .
Duty to child trespasser on turntable. 57	NEW TRIAL.
	Grounds for granting new trial:

References in heavy-faced type are to NOTES and REVIEWS; in plain type to RECENT CASES; and in italicized type to ARTICLES. Criticisms of articles in other publications are also indicated in the annual periodical index which follows this index.

Newly discovered evidence unaccompanied by affidavit of witness absent from jurisdiction. 449

NOTICE

See *Bills and Notes; Recording and Registry laws.*

Notice to agent binding on principal, see *Agency (Scope of agent's authority).*

Requirement of notice in insurance policies, see *Insurance.*

NUISANCE

See also *Insurance.*

What constitutes nuisance: Advertising on the outside of omnibuses as nuisance. 445

Obstruction of quasi-public dock. 544
Permitting exhibition of fireworks in the street. 543

Equitable relief: State's rights when another state diverts an interstate river. 132, 144

Recovery of damages: Recovery of damages by one having no rights in the property affected. 633

Equitable relief: State's right when damages would afford an adequate remedy. 132, 144

Injunction against nuisance on certain land to be binding on grantees ignorant of the injunction. 220

O

OBITUARY.

See *Legal Biography.*

OLEOMARGARINE

See *Police Power.*

ORDINANCES.

See *Municipal Corporations (Proceedings of council or other governing body).*

ORIGIN OF LAW.

See *Law.*

OUSTER.

See *Quo Warranto.*

OWNERSHIP.

See *Title, Ownership, and Possession.*

P

PARENT AND CHILD.

See also *Contributory Negligence (Imputed negligence).*

Child's right to maintenance by parent. 66

Child's right to payment for services through emancipation. 66

Parent's right to services of child. 66

PAROL EVIDENCE RULE.

Construction of documents: Proving by parol, warranty not mentioned in written contract of sale. 565, 566

Deed: proving a paper drawn as a deed to be a will by parol evidence of *animus testandi*. 451

Wills: extrinsic evidence when land not owned exactly described. 434, 452

— proving a paper drawn as a deed to be a will by parol evidence of *animus testandi*. 451

PARTNERSHIP.

See also *Conflict of Laws.*

Nature of partnership: Situs for probate duty of deceased partner's interest in a firm whose partners do not live where the firm does business. 221

Rights, duties, and liabilities of partners inter se: Nature of deceased partner's interest. 221

Validity of judgment obtained at home of partnership against absent partner. 285

Rights and remedies of creditors: Creditor of ostensible partnership attaching apparent firm assets after individual creditor. 292

See also under *Bankruptcy.*

Dissolution and winding up: Validity of decree against an absent partner. 285

Joint stock companies: Negotiability of coupon bonds payable from company's assets upon which stockholders are not liable. 441

PARTY WALLS.

Compensation from adjoining owner for use of party wall built without his consent. 222

PATENTS.

Regulation: State prohibiting contract by vendor of patented article restricting the use of articles to be used with the patented article. 62

Infringement: Expiration of patent as affecting remedy in equity. 544

TABLE OF CONTENTS.

xxix

References in heavy-faced type are to NOTES and REVIEWS; in plain type to RECENT CASES; and in italicised type to ARTICLES. Criticisms of articles in other publications are also indicated in the annual periodical index which follows this index.

Selling unpatented records of value only when used in combination with patented talking-machine. 150	upon uses to which carrier may put its property. 609-610
Statutory compensatory damages measured by owner's license fees without interest, regardless of infringer's profits. 293	Prohibition of contract by vendor of patented article restricting use of articles to be used with patented article. 62
PAYMENT.	Statute providing that upper berth when unoccupied should be closed if occupant of lower berth so requested. 372
Application: Creditor's right to apply payment to debt barred by statute of limitations. 623, 633	Public service agencies: Power to regulate rates compared with police power as justification for federal limitation upon uses to which carrier may put its property. 609-610
PERSONS.	See <i>Carriers; Public Service Companies.</i>
See <i>Husband and Wife; Infants; Insane Persons.</i>	POSSESSION.
PHYSICIANS AND SURGEONS.	See <i>Title, Ownership, and Possession.</i>
Communication between physician and patient privileged, see <i>Evidence; Witnesses (Privileged communications).</i>	POSTHUMOUS CHILD.
PLEADING.	See <i>Infants (Unborn children).</i>
See <i>Criminal Law (Procedure).</i>	POST-OFFICE.
PLEDGES.	Power of postmaster-general to withhold mail pending investigation of fraud of addressee. 150
See also <i>Chattel Mortgages.</i>	POWERS.
Right of pledges with power to sell without notice, to buy after pledgor has been adjudicated bankrupt. 441	Equitable relief after defective appointment under special power. 222
Transfer of possession: validity of pledge when goods are stored on pledgor's premises. 61	PREFERENCES.
Stock carried on margin as constituting pledge. 627	See under <i>Bankruptcy.</i>
POLICE POWER.	PRESCRIPTION.
See also <i>Constitutional Law (Due process of law).</i>	See under <i>Easements.</i>
Nature and extent: Denying to foreign corporation recourse to federal courts. 215	PRESUMPTIONS.
Regulation of business and occupations: Forbidding display of advertisements on the outside of omnibuses. 445	Existence and effect of presumptions in particular cases: Contracts: presumption as to which of several debts payment should be applied to. 623, 633
Forbidding payment of wages in tickets exchangeable for goods. 56	Effect of presumption of death upon marketability of title to real estate. 374
Prohibition of night work by women in factories. 62	Effect of presumption of death without legal issue upon marketability of title to real estate. 374
State license tax for peddling and soliciting orders for picture frames. 632	PRIORITIES.
Tax on insurance companies for the benefit of disabled firemen. 277, 295	See <i>Bankruptcy; Partnership.</i>
Tax on oleomargarine levied to regulate its sale. 455	PRIVACY, RIGHT OF.
Statute requiring weekly payment of employees in money. 444	Nature of the right: Independent of the right to property, professional reputation, or freedom from exposure to litigation. 54, 58, 63
Ten-hour law for women in factories. 544	Infringement: Unauthorized use of name and picture for purposes of advertisement. 63
Regulation of property and use thereof: Power to regulate rates compared with the police power as justification for federal limitation	PRIVILEGED COMMUNICATIONS.
	See under <i>Witnesses.</i>
	PROBABLE CAUSE.
	See under <i>Malicious Prosecution.</i>
	PROBATE.
	See under <i>Wills.</i>

References in heavy-faced type are to NOTES and REVIEWS; in plain type to RECENT CASES; and in italicized type to ARTICLES. Criticisms of articles in other publications are also indicated in the annual periodical index which follows this index.

PROCEDURE.

See *Criminal Law; Equity; Federal Courts; Indictment and Information; New Trial; Trial.*

PROCESS.

Manner and effect of service: Validity of unreasonable service by publication upon domestic corporations. 453, 539
Validity of unreasonable service on agent of foreign corporation doing business in the state. 453
Validity of unreasonable service upon foreign corporation which has ceased to do business in the state. 453

PROMISSORY NOTES.

See *Bills and Notes.*

PROPERTY.

See *Title, Ownership, and Possession.*

PROSECUTING ATTORNEYS.

See *District and Prosecuting Attorneys.*

PROXIMATE CAUSE.

Efficient cause of injury: Historical discussion of tests of proximity of legal causation. 234-236
Libel of sister causing damage to brother's reputation. 448
Proximate cause as basis of defense of contributory negligence. 234-242
Concurrent causes: Doctrine of last clear chance as arbitrary limitation of liability for proximate damage. 233-242, 259-260
Intervening causes: Intervention of wrongful act of third person as arbitrary limitation of liability for proximate damage. 236-239
Owner injured in saving property endangered by defendant's negligence. 293

PUBLIC OFFICERS.

Enforcement of performance of duties, see under *Mandamus.*
Ousting public officers, see *Quo Warranto.*
Powers and Duties: Duty to enforce

statute of which the official doubts the constitutionality. 438, 444

De facto officers: Validity of acts when the office does not exist *de jure.* 153, 449

Compensation: Constitutionality of municipal appropriation to reimburse officers for liability for illegal acts committed in the course of duty. 625, 633

Liability of: Eleventh Amendment as applied to suits against state officers. 527, 540

Personal liability of public officer for receiving a preference in his public capacity, when statute does not allow him to be sued for such a wrong 534, 538

PUBLIC SERVICE COMPANIES.

See also *Carriers; Franchises; Interstate Commerce; Railroads; Street Railways; Theatres.*

Regulation: Application of state law forbidding combinations in restraint of trade to public service companies. 633

Compelling particular service which does not pay for itself. 49, 56

Legislature authorizing unreasonably high gas rate. 56

Mandamus to compel telephone company to comply with municipal ordinance which granted franchise. 448

Power to regulate rates compared with police power as justification for federal limitation upon uses to which carrier may put its property. 609-610

Rights and Duties: Contract by hotel to employ one telephone company exclusively. 62

Duty to furnish particular service. 49, 56

Liability for conspiracy to discriminate against plaintiff in the absence of intent to discriminate against him. 546

Of Carriers, see under *Carriers.*

Q

QUANTUM MERUIT.

See *Quasi-Contracts.*

QUASI-CONTRACTS.

Nature and scope of the obligation: Recovery by plaintiff for part performance of illegal contract, *malum prohibitum*, when he has disaffirmed before performing illegal part. 137, 151
Recovery under illegal contract, in general. 137, 151

Rights arising from mistake of law:

Recovery of money paid under mistake of law. 225

Rights and obligations of parties in default under contract: Recovery by plaintiff for part performance of illegal contract, *malum prohibitum*, when he has disaffirmed before performing illegal part. 137, 151

Recovery by plaintiff in default for

TABLE OF CONTENTS.

XXXI

References in heavy-faced type are to NOTES and REVIEWS; in plain type to RECENT CASES; and in italicized type to ARTICLES. Criticisms of articles in other publications are also indicated in the annual periodical index which follows this index.

- | | |
|--|--|
| <p>services rendered under contract
unenforceable under statute of
frauds. 544</p> <p>Recovery for benefits conferred
without contract: Compensation
from adjoining owner for use</p> | <p>of party wall built without his con-
sent. 222</p> <p>QUO WARRANTO.
<i>Mandamus</i> to compel state's attorney to
bring <i>quo warranto</i> to oust an officer
in private corporation. 371</p> |
|--|--|

R

RAILROADS.

See also *Carriers; Interstate Commerce; Public Service Companies; Street Railways.*

Title to land or right of way: Conclusiveness of finding of city council that right of way is so benefited as to be subject to assessment. 292

Right to run electric interurban railway carrying freight, in public street. 58

Railroad crossings: Compensation for alterations required by statute when a highway is opened across a railway. 288

Right of an electric railway on a crossing impliedly dedicated by a railroad. 629

Liability to employees: See *Master and Servant.*

Liability for fires: Validity of contract exempting from statutory liability for loss by fire. 289

See also *Proximate Cause.*

Federal regulation in general. See under *Interstate Commerce.*

State regulation in general. See under *Carriers.*

Regulation of rates. See *Carriers; Interstate Commerce.*

RATES.

See *Carriers; Interstate Commerce; Public Service Companies.*

RECEIVERS.

See also *Insane Persons.*

Effect of possession upon jurisdiction in receiverships. 433, 446

Liability for receivership expenses in general. 529, 545

Liability for receivership expenses when receiver illegally appointed. 529, 545

Liability for receivership expenses when receivership is vacated on appeal. 529, 545

Liability for receivership expenses when the funds prove insufficient. 529, 545

Merger of claim against corporation in judgment obtained after the appointment of receivers. 214

Power of state to dissolve corporation

whose property is in the hands of federal receiver. 279, 293

Right of state court to establish claim against property which federal receiver has sold on condition that certain claims against it be paid by purchaser. 433, 446

State control of property in federal receiver's hands when state court has jurisdiction of another action concerning the same property. 279, 293

Validity of tax deed of property in receiver's hands given on account of taxes due before the receivership. 441

RECORDING AND REGISTRY LAWS.

General nature and scope: Application of recording laws in Germany to marriage, commercial matters, mines, ships, patents, trade-marks and instruments. 492-495

Effect upon the title to the off-spring of mortgaged animals 443

Possession under unrecorded deed not adverse to grantor. 363

Registration of real rights in Germany. 485-488

REFORMATION OF INSTRUMENTS.

See *Wills.*

REMAINDERMEN.

See *Limitation of Actions; Vested, Contingent, and Future Interests.*

RENDITION.

See under *Extradition.*

RENT.

See under *Landlord and Tenant.*

RESTRAINT OF TRADE.

See also *Good Will; Torts; Unfair Competition.*

Monopoly: Application to public service companies of state law forbidding monopoly. 633

Validity of covenant not to sell liquor on certain land when the covenant is taken to create a monopoly. 450

Contracts not to engage in certain business: Effect of a restrictive agreement made by one corporation

References in heavy-faced type are to *NOTES* and *REVIEWS*; in plain type to *RECENT CASES*; and in italicized type to *ARTICLES*. Criticisms of articles in other publications are also indicated in the annual periodical index which follows this index.

- upon a new corporation composed of the same stockholders. 445
- Contracts between non-competitors:** Contract by vendee of patented article to buy only of the vendor articles to be used with the patented article. 62
- Contract by hotel to employ one telephone company exclusively. 62
- State anti-trust legislation:** Application of statute forbidding combinations in restraint of trade to public service companies. 633
- Sherman anti-trust law:** Liability for treble damages under act of labor union for boycotting. 450
- RESTRAINTS ON ALIENATION.**
See *Trusts*.
- RESTRICTIONS AND RESTRICTIVE AGREEMENTS AS TO USE OF PROPERTY.**
See also *Landlord and Tenant*.
Compensation for right when the land subject to the agreement is taken by eminent domain. 139, 146
- Contract by vendee of patented article to buy only of vendor certain articles to be used with patented article. 62
- Covenant not to sell liquor, taken to create a monopoly. 450
- Effect of injunction against nuisance on certain property upon subsequent innocent grantees. 220
- Nature of the right created, how far a property right. 139, 146
- RIGHT OF PRIVACY.**
See *Privacy, Right of*.
- RIGHT OF SUPPORT.**
See *Support, Right of*.
- RIGHT OF WAY.**
See *Easements; Eminent Domain; Highways; Railroads; Street Railways*.
- RIPARIAN RIGHTS.**
See *Water and Watercourses*.

S

- SALES.**
See also *Statute of Frauds*.
- Subject-matter of sale:** Future earnings compared to property potentially possessed. 275, 285
- Fraud and related matters:** See *Fraudulent Conveyances*.
- Implied warranties:** Sale of bonds when issues are all or in part unauthorized. 294
- Sale of stock of *de facto* corporation. 294
- Warranties: remedies for breach:** Measure of damages in case of bad seed when part of the proper crop grows. 286
- Sale of Goods Act, 1893 (England):** Mailing check according to agreement, not a payment. 222
- Express warranties:** Buyer's reliance on seller's statements as essential element of action on warranty. 570-576
- Effect of inspection on warranty. 572
- Intent to warrant as necessary element in establishing warranty. 559-561
- Necessity of consideration to support warranty. 573-575
- Tort as basis of action on warranty. 555-559
- Statements made subsequent to the bargain. 575-576
- Statements of vendor's opinion as basis of warranty. 567-568
- Warranty of obvious defects. 570-571
- What constitutes express warranty, in general. 555-582
- Words of description as constituting warranty. 562-564
- SALVAGE.**
Services rendered to ship in dry dock. 634
- SEED.**
See *Crops*.
- SENTENCE.**
See under *Criminal Law*.
- SEPARATE ESTATE.**
See under *Husband and Wife*.
- SEPARATION AGREEMENTS.**
See *Husband and Wife (Contracts between husband and wife)*.
- SERVICE.**
See *Process*.
On foreign corporations, see *Conflict of Laws*.
- SET-OFF AND COUNTERCLAIM.**
Return of payment to debtor paying bankrupt in ignorance of set-off. 141
- Set-off of debt of original legatee against his heir substituted by statute to prevent lapse. 291
- SHERIFFS AND CONSTABLES.**
See *Execution*.
- SITUS.**
Of choses in action, see under *Conflict of Laws*.

TABLE OF CONTENTS.

xxxiii

References in heavy-faced type are to NOTES and REVIEWS; in plain type to RECENT CASES; and in italicized type to ARTICLES. Criticisms of articles in other publications are also indicated in the annual periodical index which follows this index.

SLANDER.

See *Libel and Slander*.

SLEEPING-CAR COMPANIES.

See under *Carriers*.

SOVEREIGNS.

See also *Conflict of Laws; International Law*.

Action by trustee process against railway owned by foreign sovereign. 545

Common law immunity of sovereign and liability of agent compared with the Eleventh Amendment. 527, 540

SPECIFIC PERFORMANCE.

Affirmative contracts: Compelling vendor to convey land after termination of pending suit in ejectment. 372

Effect of the presumption of death upon vendor's title. 374

Effect of the presumption of death without issue upon vendor's title. 374

Enforcement by assignee of contract to convey land to alien. 363

Legal consequences of right of specific performance: Equitable conversion of property to be sold after the termination of a particular estate. 288

Defenses: Compelling vendor to convey land after termination of pending suit in ejectment. 372

Effect of the presumption of death upon the vendor's title. 374

Effect of presumption of death without issue upon vendor's title. 374

Enforcement by assignee of contract to convey land to alien. 363

STATES.

See also *Conflict of Laws; Constitutional Law*.

Relations of state and federal courts, see under *Federal Courts*.

Eleventh Amendment as applied to suits against state officers. 527, 540

Federal court enjoining state officer from enforcing unconstitutional state statute. 527, 540

Law governing state's right to injunction against individual for nuisance committed in another state. 132, 144

Law governing the rights of states in an interstate river. 132, 144

Position of state boundary on navigable river. 223

Power of state to compel acts in another state by consent implied through entering the Union. 354, 365

Power of state to declare its redeemed negotiable bonds void so that later holders in due course shall be unprotected. 282, 294

Power of state to dissolve a corporation whose property is in the hands of a federal receiver. 279, 293

Right of one state to condemn another state's water supply. 25-28, 30-31

State's power to forbid water from streams to be carried outside state in pipes. 627

State's right to land by escheat as ground for contesting will. 452

Validity of negotiable state bond stolen after redemption and before maturity and improperly not cancelled. 282, 294

STATUTE OF FRAUDS.

Part performance: Effect of mailing check according to agreement. 222

Recovery in quasi-contract for services rendered by plaintiff who is in default under a contract unenforceable by the statute of frauds. 544

Operation and effect of statute: Validity of contract in which one of several acts promised by one party is unenforceable under statute of frauds. 549

STATUTE OF LIMITATIONS.

See *Limitation of Actions*.

STATUTES.

See also *Conflict of Laws*.

Interpretation: Advantages of strict and liberal construction: general discussion. 385-390, 403-407

Effect of clause saving only pending actions when there is a general saving statute. 223, 545

Liberal construction of exemption clauses. 213

Friction between statute and principles of common law as limitation of legislative power. 396-403

International law as limitation on legislative power. 394-396

Natural law as limitation of legislative power. 390-393

Possibility of liberal construction of statutes in common law system. 388-390

STEAMSHIPS.

See *Carriers; Admiralty*.

STOCK.

See under *Corporations*.

STREET RAILWAYS.

General duties as carrier, see *Carriers*.

Franchises: Advertising on the outside of omnibuses held *ultra vires*. 445

Permit by municipal corporation to build a private spur track from the street. 221

Municipal regulation and control: Municipality preventing the use of the

References in heavy-faced type are to NOTES and REVIEWS; in plain type to RECENT CASES; and in italicized type to ARTICLES. Criticisms of articles in other publications are also indicated in the annual periodical index which follows this index.

- outside of omnibuses for advertising purposes. 445
- Abutters' right to damages:** Additional servitude: electric interurban railway carrying freight. 58
- Additional servitude: Electric railway on crossing impliedly dedicated by railroad. 629
- Interruption of prescription by adding third track to elevated railway. 629
- STRIKES.**
- See *Torts; Trade Unions, Unfair Competition.*
- STUDY OF LAW.**
- Criticism of Mr. Kales' suggestion that the case-book be localized. 118-119
- Should case-books be constructed with a view to teaching the law of one jurisdiction. 93-118
- Tendency of study of cases to advance uniformity of law. 521-522
- SUCCESSION.**
- See *Conflict of Laws; Taxation.*
- SUBROGATION.**
- See under *Suretyship.*

SUICIDE.

See *Insurance (Defenses of insurer).*

SUPPORT, RIGHT OF.

Effect of diminution of value due to fear of further subseidance upon the measure of damages. 367

SURETYSHIP.

See also *Husband and Wife.*

- Surety's defenses:** on general principles of contract: Parol variation of written contract between principal and obligee. 63
- Surety's defenses:** absence, extinction, or suspension of principal obligation: Effect of death of lunatic on liability of his receiver's surety. 147
- Surety's defenses:** extension of time to principal: Effect on surety who is joint maker. 55
- Surety's right of subrogation:** Power to reach obligations from which principal would have been reimbursed if he had performed. 545

T**TAXATION.**

- General limitations on the taxing power:** Application of general privilege tax to wagons engaged in interstate commerce. 618, 634
- Application of general property tax to wagons engaged in interstate commerce. 618, 634
- Compelling the assessment of a tax of which the official doubts the constitutionality. 438, 444
- Hearing on tax assessment required by due process of law. 285
- Judicial construction of the requirement of a public purpose. 277, 295
- Necessity of a public purpose in the absence of express or implied constitutional provision. 277, 295
- Validity under federal statute of state tax on national bank shares without reduction for debts when other moneyed capital is taxed at higher rate but with reduction. 295
- See also *infra, Property subject to taxation.*
- Particular forms of taxation:** Betterment taxes: assessment for street sprinkling. 533, 546
- conclusiveness of finding of city council that railroad's right of way is benefited. 292
- effect of condition in dedication of a highway that abutters be free from assessment. 356, 367

- Betterment taxes: nature of a special assessment. 533, 546
- set-off against an award for property condemned. 368
- Inheritance tax:** stock of corporation incorporated in several states taxable in proportion to the value of the property in each state. 295
- License tax on peddlers of frames who also sell portraits. 632
- Time of vesting of title as determining liability to inheritance tax. 435, 450
- Property subject to taxation:** Articles of interstate and foreign commerce still in the original packages. 353, 373
- Privilege tax on wagons engaged in interstate commerce. 618, 634
- Proceeds from sale of foreign imports, retained temporarily in the bank to pay small expenses taxed as property employed in business. 353, 373
- Proceeds of federal salary deposited in bank. 373
- Special assessment of railroad's right of way. 292
- Purposes for which taxes may be levied:** Constitutionality of municipal appropriation to reimburse officers for liability for illegal acts committed in the course of duty. 625, 633
- Official primary elections. 622, 630

TABLE OF CONTENTS.

XXXV

References in heavy-faced type are to NOTES and REVIEWS; in plain type to RECENT CASES; and in italicized type to ARTICLES. Criticisms of articles in other publications are also indicated in the annual periodical index which follows this index.

Special assessment for street sprinkling.	533, 546
State aid to disabled firemen.	277, 295
Tax on oleomargarine in order to regulate its sale.	455
Where property may be taxed:	
Inheritance tax on stock of corporation incorporated in several states.	295
Probate duty on deceased partner's interest in a firm whose partners do not live where the firm does business.	221
Situs of promissory notes.	50, 63
Tax titles: Validity of tax deed of property of bankrupt sold for taxes before adjudication.	441
Collection and enforcement: Suing in <i>assumpsit</i> for tax when no other method of collection is provided.	283, 295
Suing in <i>assumpsit</i> for tax for whose non-payment a fine is imposed.	283, 295
Exemptions: Basis of the exemption of university property from taxation.	617, 634
Liability to taxation of land leased from a university.	617, 634
TEACHING OF LAW.	
See <i>Study of Law.</i>	
TELEGRAPH AND TELEPHONE COMPANIES.	
See also <i>Interstate Commerce; Public Service Companies.</i>	
Status of companies as engaged in public employment: Ability to contract for exclusive service.	62
TENANCY IN COMMON.	
Compensation to one tenant under disability for injury from elevated railroad which has run for the prescriptive period.	371
Effect of co-devisee's promise made to prevent alteration of a will, upon other co-devisees.	286
THEATRES.	
Combination of managers to exclude a critic.	144
Recovery for mental anguish caused by exclusion on account of being attired in naval uniform.	541
TICKETS.	
See under <i>Carriers.</i>	
TITLE, OWNERSHIP, AND POSSESSION.	
See also <i>Vested, Contingent, and Future Interests.</i>	
Ownership: Nature of easement as	

property right limited to determined purpose.	359, 368
Nature of sovereign's right to land by escheat.	151
State's right to land by escheat as ground for contesting a will.	452
Possession: Effect upon an easement of unity of ownership when the possession is in tenant for years.	359, 368
Possession of unknown contents of receptacle.	64, 223
Right of heir of adverse possessor to maintain ejectment without having had possession.	375
Things subject to ownership:	
Right in artistic creations before copyright.	634
Right of one having the benefit of a restrictive agreement on land.	139, 146
Situs of the property right in a trademark.	361, 373

TORTS.

See also <i>Admiralty; Animals; Assault and Battery; Bills of Peace; Conflict of Laws; Dangerous Premises; Death by Wrongful Act; Negligence; Negligent Misrepresentation; Proximate Cause; Trover and Conversion.</i>	
Interference with business or occupation: Enjoining threatened sale by ticket-brokers of non-transferable tickets.	365
Inducing breach of contract not to sell a chattel.	451
Liability for treble damages under the Sherman Anti-Trust Act of labor union for boycotting.	450
Validity of contract made to cause the breach of existing contract.	290
Removal of liability because of competition, see <i>Unfair Competition.</i>	
Existence of tort liability in various unusual cases: Liability to brother for damage caused by libelling sister.	448
Tort as basis of action on express warranty in sales.	555-559

TRADE-MARKS AND TRADE-NAMES.

Marks and names subject of ownership: Descriptive words.	361, 373
Protection apart from statute: Effect of confiscation of trade-mark by the country where the goods are made upon right in the trade-mark where the goods are sold.	361, 373

References in heavy-faced type are to NOTES and REVIEWS; in plain type to RECENT CASES; and in italicized type to ARTICLES. Criticisms of articles in other publications are also indicated in the annual periodical index which follows this index.

- Situs of property right in trade-mark. 361, 373
- TRADE SECRETS.**
See under *Title, Ownership, and Possession.*
- TRADE UNIONS.**
See also *Restraint of Trade; Torts; Unfair Competition.*
In general: Application of Sherman Anti-Trust Act to trade unions. 450
Constitutionality of statute forbidding discrimination against employee because of his membership in labor organization. 370
Strikes: As constituting a *prima facie* tort, see *Torts (Interference with business or occupation).*
As justified by desire to advance the union, see *Unfair Competition.*
Inducing workmen to leave otherwise than by strike: As constituting *prima facie* tort, see *Torts (Interference with business or occupation).*
As justified by desire to advance the union, see *Unfair Competition.*
Boycotts: As constituting a *prima facie* tort, see *Torts (Interference with business or occupation).*
As justified by desire to advance the union, see *Unfair Competition.*
- TRANSFER OF STOCK.**
See *Corporations (Capital, stock, and dividends).*
- TREASON.**
Resident alien's duty of allegiance when his natural sovereign occupies the territory. 64
- TREATIES.**
See under *International Law.*
- TRESPASS TO REALTY.**
What constitutes a trespass: Forcible eviction of trespasser by owner. 295
Equitable relief: See *Injunctions (Acts restrained).*
- TRIAL.**
See *Constitutional Law; Criminal Law; New Trial.*
Modes of trial: Advisability of trial by jury in cases of criminal and civil contempt. 171-174
- TROVER AND CONVERSION.**
See also *Damages.*
What constitutes conversion: General requisites. 408-415
Intent to deprive permanently of all rights in chattel as an element of conversion. 409-415
- Physical interference with chattel as element of conversion. 408-409
Who may sue: Time of accrual of action in favor of holder of future interest in personality for conversion by holder of life interest. 542
Damages: See *Damages.*
- TRUSTEE PROCESS.**
See *Garnishment.*
- TRUSTS.**
See also *Assignments for Creditors; Bankruptcy; Charities and Trusts for Charitable Uses; Constructive Trusts; Uses; Vested, Contingent, and Future Interests.*
Nature of the trust relation: Origin of trusts. 270-274
Trusts as the product of equitable procedure. 270-274
Use upon a use as a passive trust, historical discussion. 272-274
Creation and validity: See *Conflict of Laws.*
See also *infra, Restraints on alienation of cestui's interest.*
Cestui's interest in res: Right to excess of interest obtained by breach of trust as between tenant for life and remainderman. 546
Right to salary of director who holds in trust shares he must hold as director. 217, 366
Powers and obligations of trustees: Leasing trust property, in general. 211, 223
Leasing without express power for term that may extend beyond trust. 211, 223
Powers and duties of trustees: Liability for negligent failure to collect trust property. 441
Rights and liabilities of third parties: *Cestui* estopped by trustee's misrepresentation. 53, 64
Restraints on alienation of cestui's interest: Basis of the rule against restraints on alienation at common law. 299
Basis of the rule against restraints on alienation in New York. 299
Validity in New York when the trustee may change *res*, but may not terminate trust. 299
Cy pres doctrine: Rights of beneficiaries after defective appointment under special power. 222
Trustee's implied power to lease for term that may extend beyond trust. 211, 223

TABLE OF CONTENTS.

xxxvii

References in heavy-faced type are to NOTES and REVIEWS; in plain type to RECENT CASES; and in italicized type to ARTICLES. Criticisms of articles in other publications are also indicated in the annual periodical index which follows this index.

U

ULTRA VIRES.

See under *Corporations*.

UNFAIR COMPETITION.

See also *Restraint of Trade*; *Torts*; *Trade Unions*.

In general: Inducing breach of contract not to sell a chattel. 450
Liability for treble damages under Sherman Anti-Trust Law of labor union for boycotting. 450

Conspiracy: Necessity of intent to injure the plaintiff in conspiracy to do illegal act. 546

Procurement of breach of contract: As constituting a *prima facie* tort, see *Torts* (*Interference with business or occupation*).

Interference between employer and employee not causing a breach of contract: Justification: desire to advance a central union of related unions. 635
—desire to advance union with by-law compelling employers to submit

disputes to arbitration of central union. 635

USES.

Origin of uses. 261-269

Use upon a use as a passive trust under the statute of uses, historical discussion. 272-274

Uses as the product of equitable procedure. 261-269

USURY.

Nature and validity of usurious contract: Federal statute making valid for national banks, notes void under state law. 136, 144

Usurious rate charged by broker for borrowing money to buy stock on margin. 638

Validity under New York statute of usurious note taken by bank with notice. 451

Validity under New York statute of usurious note taken by bank without notice. 136, 144

V

VENDOR AND PURCHASER.

See *Specific Performance*.

VENUE.

See *Federal Courts*.

VESTED, CONTINGENT, AND FUTURE INTERESTS.

See also *Legacies and Devises*; *Life Estates*; *Wills*.

Executory devises: effect of lapse of previous estate without the happening of the contingency. 451

Executory devises: right of executory devisee to compensation when property is taken by eminent domain before his interest has vested. 218

Future interests in personalty: machinery devised with other property for life and remainder. 635

—time of accrual of action in favor of remainderman for conversion by life tenant. 542

VOTING.

See *Elections*.

W

WAGES.

Regulation of, see *Constitutional Law*.

Assignment of future wages, see *Choses in Action*.

WAIVER.

See *Constitutional Law* (*Trial by jury*); *Witnesses* (*Privileged communication*).

As basis for equity jurisdiction, see *Equity*.

WAR.

Military persons as contraband of war. 636

WARRANTY.

In sales of personal property, see under *Sales*.

WATERS AND WATER-COURSES.

See also *Nuisance*.

Natural watercourses: ownership of bed and banks: Extension of city boundaries to pier built into navigable river. 364

Position of state boundary line after avulsion. 223

Position of state boundary on a navigable river. 223

References in heavy-faced type are to NOTES and REVIEWS; in plain type to RECENT CASES; and in italicized type to ARTICLES. Criticisms of articles in other publications are also indicated in the annual periodical index which follows this index.

Natural watercourses: obstruction, pollution, and diversion:

Right of one state to condemn water supply in another state. 25-28

State's right to injunction when damages would afford adequate remedy. 132, 144

State's rights when another state diverts interstate river. 132, 144

Public rights: State's power to forbid water from streams to be carried outside state in pipes. 627

WAYS.

See *Boundaries; Highways.*

WILLS.

See also *Conflict of Laws (Testamentary succession); Executors and Administrators; Legacies and Devises; Taxation; Vested, Contingent, and Future Interests.*

Execution: What satisfies requirement that signature should be at end of will. 452

Probate: Functions of a German probate court. 489-491

Probate of will of one who died without heirs contested by state claiming right of distribution. 452

Situs of property for probate duty, see under *Conflict of Laws.*

Construction: Cases in which a testamentary gift to a class includes a child *en ventre sa mère.* 360, 369

Implication of gift to issue because of gift over on failure of issue. 451

Proving an undelivered deed to be a will by parol evidence of *animus testandi.* 451

Rights of residuary legatee and next of kin to a reversion subject to a power. 151

Striking out words of incorrect description, and construing the document as altered. 434, 452

Words whose primary meaning is contrary to testator's purpose as proved by extrinsic circumstances. 434, 452

Revocation: Dependent relative revocation compared with defective change of beneficiary in a mutual benefit policy. 278, 290

WITNESSES.

See also *New Trial.*

Competency in general: Competency of witness convicted in another state to testify. 547

Privilege against self-incrimination: Requiring brokers to produce books on account of stock transfer tax which it was criminal not to pay. 621, 636

Privileged communications: Waiver of attorney's privilege by publishing the communication. 64

Waiver of physician's privilege by commission to take his testimony. 64

BOOK REVIEWS.

	PAGE
Abbott: The Principles and Forms of Practice. Second edition. Edited by Carlos C. Alden	228, 551
Anson: The Law and Custom of the Constitution. Vol. II. The Crown. Part I. Third edition	551
Barclay: Problems of International Practice and Diplomacy	380
Bentwich: The Law of Private Property in War	230
Bernard: The First Year of Roman Law	71
Beven: Negligence in Law. Third edition	552
Bigelow: The Law of Torts. Eighth edition	156
Burge: Colonial Laws and Court. Edited by Alexander Wood Renton and George Grenville Phillimore	643
Carr: Collective Ownership otherwise than by Corporation or by Means of the Trust	381
Carter: Law: Its Origin, Growth, and Function	377
Childs: Handbook of the Law of Suretyship and Guaranty	304
Clark: History of Roman Private Law	72
Cockle: Leading Cases on the Law of Evidence	232
Dean: A Digest of Corporation Cases	160
Dewhurst: The Rules of Practice in the United States Courts. Annotated	300
Dudley: Military Law and Procedure of Courts-Martial	644
Gaus: The American Government, Organization, and Officials, with the Duties and Powers of Federal Office-Holders	642
Gibson: Suits in Chancery. Second edition	229
Gregory: Samuel Freeman Miller	379
Hamilton: The Law of Taxation by Special Assessments	301
Hershey: The International Law and Diplomacy of the Russo-Japanese War	73
Hockheimer: The Law of Crimes and Criminal Procedure. Second edition	380
Hoyt: The Mecklenburg Declaration of Independence	231
Ilbert: The Government of India. Second edition	231
Jones: A Treatise on the Law of Corporate Bonds and Mortgages	379
Loring: A Trustee's Handbook. Third edition	457
McGehee: Due Process of Law under the Federal Constitution	69
McKelvey: Handbook of the Law of Evidence. Second edition, revised	303
Maupin: Marketable Title to Real Estate. Second edition	158
Neubecker: Die Tuberkulose nach ihren juristischen Beziehung in rechtsvergleichender Darstellung	379
Phipson: Manual of the Law of Evidence	379
Phipson: The Law of Evidence. Fourth edition	157
Pierce: Federal Usurpation	645
Pike: The Public Records and the Constitution	230
Rose: A Code of Federal Procedure	228

	PAGE
Schuster: <i>The Principles of German Civil Law</i>	73
Select Essays in Anglo-American Legal History. Vol. I. Compiled and edited by a committee of the Association of American Law Schools	640
Sharswood: <i>Reports of the American Bar Association. Vol. XXXII. An Essay on Professional Ethics. Fifth edition</i>	553
Smith: <i>Frederic William Maitland</i>	458
Thayer: <i>Legal Essays</i>	457
Van Dyne: <i>A Treatise on the Law of Naturalization of the United States</i> . .	382
Van Zile: <i>Elements of the Law of Bailments and Carriers. Second edition</i> . .	644
Walker: <i>A Manual of Public International Law</i>	380
Wharton: <i>The Law of Homicide. Third edition</i>	72
White: <i>Commentaries on the Constitution of Pennsylvania</i>	302
Wigmore: <i>A Supplement to a Treatise on the System of Evidence in Trials at Common Law</i>	377

TABLE OF CASES.

References in heavy-faced type are to NOTES; all others are to RECENT CASES. Citations to decisions which were noticed before their appearance in any regular report have been supplied wherever possible.

	PAGE		PAGE
A Solicitor, <i>In re</i>	140	Bank of Commerce v. Baldwin	619, 631
Adair v. United States (208 U. S. 161)	370	Bank of Kentucky, Yeager v. . .	542
Adams v. Bosworth	133, 145	Barclay, <i>Ex parte</i>	145
Adelbert College, Wabash R. R. Co. v.	433, 446	Bartels, <i>Re</i>	219
Ætna Fire Ins. Co. v. Jones	277, 295	Bassing v. Cady	541
Allen, Fifer v.	218	Baum, <i>In re</i> (121 N. Y. App. Div. 496)	446
American Soda Fountain Co. v. Stolzenbach	535, 541	Beach, Buck v.	50, 63
American Tobacco Co. v. Werckmeister	286	Berryman v. Megginson	287
Andersen v. Marten ([1908] 1 K. B. 601)	55, 440	Biddle v. United States	437, 447
Anglo-Algerian S. S. Co. v. Houlder Line	544	Bitterman v. Louisville, etc., R. Co.	365
Antioch Coal Co. v. Rockey	284	Bobbitt, Jordan v.	543
Application of the Atty.-Gen., In the Matter of the	633	Bollinger v. McMinn	295
Arbitration between Donovan and Burke, In the Matter of an	537	Bondy v. New York City R. Co.	445
Armour Packing Co. v. United States	135, 147, 542	Booth, Burgess v.	630
Atchison, etc., Ry. Co., Merritt Creamery Co. v.	539	Borough of Atlantic Highlands, Simpson-Crawford Co. v.	618, 634
Atlantic, etc., Co., Tucker v.	363	Bosse, Noar v.	61
Atlantic, etc., R. R. Co. v. The North Carolina Corp. Comm.	49, 56	Boston & Maine R. R. Co., Citizens' Loan Ass'n v.	275, 285
Atlantic Trust Co. v. Chapman	529, 545	Boston El. Ry. Co., Soebel v.	449
Atty.-Gen., De Jager v.	64	Bosworth, Adams v.	133, 145
v. Supreme Council A. L. H.	214	Braxton County Court v. West Virginia	438, 444
Averill, Central, etc., Tel. Co. (55 N. Y. Misc. 346)	62	Brooklyn, etc., Co. v. The City of New York	56
Ayres, Rogers v.	219	Brooks, Kansas, etc., Ry. Co. v.	370
Back Bay, etc., Co., <i>In re</i>	364	Brown, Diamond Stone-Sawing Mach. Co. v.	293
Baglin v. Cusenier Co.	361, 373	Hibbs v.	441
Baird, <i>In re</i>	142	Buck v. Beach	50, 63
Baldwin, Bank of Commerce v.	619, 631	Buenzle v. Newport Amusement Ass'n	541
Ballou, Burwash v.	294	Burdell v. Grandi	450
Baltimore & Ohio R. R., Chambers v.	285	Burgess v. Booth	630
		Burke v. Wells (208 U. S. 14)	353, 373
		Burwash v. Ballou	294
		Cady, Bassing v.	541
		Cannady, Green v.	57
		Capell v. Winter	53, 64
		Carnley, Wilson v. ([1908] 1 K. B. 729)	58, 447

	PAGE		PAGE
Cellers <i>v.</i> Meachem	55	Cooke <i>v.</i> Midland, etc., Ry.	57
Central, etc., Tel. Co. <i>v.</i> Averill (55 N. Y. Misc. 346)	62	Corliss, <i>Ex parte</i>	540
Central of Georgia Ry., Coweta <i>v.</i> Wright	627	Coweta County <i>v.</i> Central of Georgia Ry. Co.	627
Chaine, Slade <i>v.</i>	285	Coyne <i>v.</i> Southern Pac. Co.	207, 215
Challoner <i>v.</i> Robinson	546	Cusenier Co., Baglin <i>v.</i>	361, 373
Chamberlain, United States <i>v.</i> (156 Fed. 881)	291	Darst <i>v.</i> Kirk	368
Chambers <i>v.</i> Baltimore & Ohio R. R.	283, 295	Davis, <i>In re</i>	285
Chapin, Kingsbury <i>v.</i>	285	Reynolds <i>v.</i>	635
Chapman, Atlantic Trust Co. <i>v.</i>	295	<i>v.</i> Phillips, Mills & Co.	222
Charles <i>v.</i> Stewart	529, 545	De Jager <i>v.</i> Atty.-Gen.	64
Chicago, Lobdell <i>v.</i>	623, 633	DeWolf <i>v.</i> Ford (119 N. Y. App. Div. 808)	58
Chicago, etc., Ry. Co., United States <i>v.</i>	149	Demers <i>v.</i> Graham	443
Chicago Telephone Co., City of Chicago <i>v.</i>	294	Denver, etc., R. R. Co., Clifford <i>v.</i>	64
Chiles, Western Union Tel. Co. <i>v.</i>	448	Depew <i>v.</i> Peck Hardware Co.	286
Citizens' Loan Ass'n <i>v.</i> Boston & Maine R. R. Co.	59	Dewar <i>v.</i> Goodman ([1908] 1 K. B. 94)	291
City of Chicago <i>v.</i> Chicago Tele- phone Co.	275, 285	Diamond Stone-Sawing Machine Co. <i>v.</i> Brown	293
City of Grafton <i>v.</i> St. Paul, etc., Ry. Co.	448	<i>v.</i> Seus	544
City of Melrose, Dyer <i>v.</i>	292	Dibden <i>v.</i> Skirrow	368
City of New York, Brooklyn, etc., Co. <i>v.</i>	288	Disconto Gesellschaft <i>v.</i> Umbreit	537
Matter of	373	Disney, Matter of	451
Melker <i>v.</i>	56	Dockstader <i>v.</i> Reed	446
Fifth Ave. Coach Co. <i>v.</i>	368	Donnell <i>v.</i> Herring, etc., Co.	445
City of Port Huron, Stephens <i>v.</i>	543	Donnell Mfg. Co. <i>v.</i> Wyman (156 Fed. 415)	150
City of St. Louis, Haeussler <i>v.</i>	445	Dover Coalfield Extension, Ltd., <i>In re</i>	217, 366
City of Seattle, Northern Pac. R. R. Co. <i>v.</i>	533, 546	Dozier <i>v.</i> State	632
Cleveland, etc., R. R. Co. <i>v.</i> Cleve- land S. S. Co.	147	Durden <i>v.</i> Southern Ry. Co.	143
Clifford, Hill <i>v.</i>	292	Dyer <i>v.</i> City of Melrose	373
<i>v.</i> Denver, etc., R. R. Co.	292	Eastern, etc., Co. <i>v.</i> Webb, etc., Co.	137, 151
Codville Georgeson Co. <i>v.</i> Smart	536	Edison-Bell Con. Phonograph Co., Nat'l Phonograph Co. <i>v.</i>	451
Collins <i>v.</i> Metropolitan Life Ins. Co.	289	Edison <i>v.</i> Edison, etc., Co.	63
<i>v.</i> Smith, (11 Ont. Wkly. Rep. 350)	64	Ehrlich <i>v.</i> Jennings	282, 294
Colorado, etc., R. Co., United States <i>v.</i>	292	Emanuel <i>v.</i> Symon ([1908] 1 K. B. 302)	285
Kansas <i>v.</i>	47, 56, 132, 144	Employers' Liability Cases (207 U. S. 463)	290
Columbian Mfg. Co., McNaboe <i>v.</i>	141	Epstein, <i>In re</i>	441
Commissioner of Stamp Duties <i>v.</i> Salting	221	Estate of Lavinia Kapu, Deceased, <i>In the Matter of the</i>	280, 290
Commonwealth <i>v.</i> Jacobs	287	Fall <i>v.</i> Fall	210, 221
Consolidated Rendering Co. <i>v.</i>	354, 365, 366	Feitner, People <i>v.</i>	295
State of Vermont		Felkel <i>v.</i> O'Brien	434, 452
		Felton, State <i>v.</i>	622, 630
		Fergusson <i>v.</i> Malvern Urban Dist. Council	633
		Fickes, Noble <i>v.</i>	451
		Fidelity, etc., Co., Woolverton <i>v.</i>	370
		Fifer <i>v.</i> Allen	218

TABLE OF CASES.

xliii

	PAGE		PAGE
Fifth Ave. Coach Co. v. City of New York	445	Hibbs v. Brown	441
Finnes v. Selover, etc., Co.	365	Hill v. Clifford	289
First Nat'l Bank, Wisner v.	626	Hocking Valley Ry. Co., Railroad Commission of Ohio v.	442
Fletcher, Lanius v.	143	Holman, <i>Ex parte</i>	628
Flynn, People v.	144	Honolulu, etc., Co., Territory of Hawaii v.	542
Ford, DeWolf v. (119 N. Y. App. Div. 808)	58	Hoodmacher v. Lehigh Valley Ry. Co.	143
Fourteenth St. Store, Sirkin v.	541	Houlder Line, Anglo-Algerian S. S. Co. v.	544
Freret v. Taylor	55	Howard v. Illinois Central R. R. (207 U. S. 463)	290
Frye v. Hubbell	443	Hubbell, Frye v.	443
Georgia v. Tennessee Copper Co.	132, 144	Hubbell Trust, <i>In re</i>	211, 223
Gerard, Waters & Co. v.	147	Hudson County Water Co. v. McCarter	627
German, etc., Ins. Co. v. Southern Ry. Co.	289	Hunt, Spiers v. ([1908] 1 K. B. 720)	369
Gilhooly, Schlesinger v.	136, 144	Huntenberg, <i>In re</i>	142
Goettl, Larson v.	628	Illinois Central R. R., Howard v. (207 U. S. 463)	290
Goodman, Dewar v. ([1908] 1 K. B. 94)	291	United States v.	294
Gordon v. Mechanics', etc., Ins. Co.	531, 538	v. Siler	293
Gorsuch, Whipple v.	149	Illinois Steel Co., City of Chicago v.	292
Gould v. Wagner (82 N. E. 10)	146	v. Schroeder	208, 215
Graham, Demers v.	443	Indemnity, etc., Co., Yangtze Insurance Ass'n v.	636
Richardson v.	359, 368	Inhabitants of Middleborough, Leonard v.	625, 633
Grand Lodge, etc., v. Mackey	278, 290	Intercolonial Ry., Mason v.	545
Grandi, Burdell v.	450	Interstate Com. Com. v. Harriman	431, 448
Great Northern Ry. Co., State v.	205, 215	Interstate, etc., Ry. Co. v. Massachusetts (207 U. S. 79)	216
v. United States	223, 545	Irvin v. Westchester Fire Ins. Co.	631
Green v. Cannady	57	Jacobs, Commonwealth v.	287
Greenshields, etc., Co. v. Stephens and Sons	369	Jennings, Ehrlich v.	282, 294
Grimes Candy Co., Menuet v.	444	Jetton v. University of the South	617, 634
Grimes, Seabrook v.	635	Johnson v. Pickering ([1908] 1 K. B. 1)	64, 223
Grundy, Spaulding v.	222	Jones, Aetna Fire Ins. Co. v.	277, 295
Guarantee, etc., Co., Thomas v.	439, 449	Jones Nat'l Bank, Yates v.	145
Haeussler v. City of St. Louis	147	Jordan v. Bobbitt	543
Haggerty, Rosenberg v.	372	v. State	56
Hammond, etc., Ry. Co., Michigan Central R. Co. v.	629	Kaiser, Wallingford v.	629
Hand, Security Warehousing Co. v.	61	Kansas, etc., Ry. Co. v. Brooks	370
Harriman, Interstate Com. Com. v.	431, 448	Kansas v. Colorado	47, 56, 132, 144
Hatfield v. Straus	221	Kellogg v. Sowerby	546
Head, Prescott Nat'l Bank v.	63	Kingsbury v. Chapin	295
Healy, People v.	371	Kinsey v. Union Traction Co.	58
Henderson-White Mfg. Co., Ward Lumber Co. v.	539	Kirk, Darst v.	368
Henningsen v. U. S. Fidelity, etc., Co.	545		
Henry, Schuler v.	631		
Herring, etc., Co., Donnell v.	445		

	PAGE		PAGE
Lancaster, State <i>v.</i>	452	Meachem, Cellers <i>v.</i>	55
Landrum, State <i>v.</i>	547	Mechanics', etc., Ins. Co., Gor-	
Lang <i>v.</i> Mayor of Bayonne . . .	449	don <i>v.</i>	531, 538
Lanius <i>v.</i> Fletcher	143	Medlock, Nat'l Surety Co. <i>v.</i> . .	366
Larson <i>v.</i> Goettl	628	Megginson, Berryman <i>v.</i>	287
Lavinia Kapu, Deceased, In the		Melker <i>v.</i> City of New York . . .	543
Matter of the Estate of	280, 290	Menuet <i>v.</i> Grimes Candy Co. . .	444
Lawlor, Loewe <i>v.</i>	450	Merrill <i>v.</i> Post Pub. Co.	448
Lawrence <i>v.</i> Rutland R. Co. . . .	444	Merritt Creamery Co. <i>v.</i> Atchi-	
Learned, Squire <i>v.</i>	60	son, etc, Ry. Co.	539
Leeds, etc., Co. <i>v.</i> Victor Talking		Metropolitan Life Ins. Co., Col-	
Mach. Co.	150	lins <i>v.</i>	530, 542
Lehigh Valley Ry. Co., Hood-		Metropolitan Ry. Receivership, <i>Re</i>	446
macher <i>v.</i>	143	Metz <i>v.</i> Maddox (189 N. Y. 460)	
Lehmaier, Schlesinger <i>v.</i>	451		138, 145, 216
Leonard <i>v.</i> Inhabitants of Middle-		Michigan Central R. Co. <i>v.</i> Ham-	
borough	625, 633	mond, etc., Ry. Co.	629
Lobban, Williams <i>v.</i>	288	Midland, etc., Ry., Cooke <i>v.</i> . .	57
Lobdell <i>v.</i> Chicago	149	Minnesota Iron Co., Nebola <i>v.</i> . .	148
Loewe <i>v.</i> Lawlor	450	Minton, Nichols <i>v.</i>	287
Long Acre, etc., Co., Matter of . .	57	Mitchell, Vanderbilt <i>v.</i>	54, 58
Lord Mayor, etc., of Dublin,		Molloy <i>v.</i> Starin	441
Pearson & Son, Ltd. <i>v.</i>	218	Moore, <i>In re</i>	630
Louisville, etc., R. Co., Bitter-		Morgan <i>v.</i> Mutual Benefit Life	
man <i>v.</i>	365	Ins. Co.	219, 289
Luby, <i>In re</i>	213	Muller <i>v.</i> Oregon	544
		Muncie Pulp Co., State <i>v.</i>	223
Macbeth <i>v.</i> North and South		Mutual Benefit Life Ins. Co.,	
Wales Bank ([1908] 1 K. B.		Morgan <i>v.</i>	219, 289
13)	214, 538	Myers <i>v.</i> Sturges	540
McCarter, Hudson County Water			
Co. <i>v.</i>	627	Napoleon Township, Painter <i>v.</i>	
Mackey, Grand Lodge, etc., <i>v.</i>			534, 538
	278, 290	Nat'l Phonograph Co. <i>v.</i> Edison-	
McMinn, Bollinger <i>v.</i>	295	Bell Con. Phonograph Co. . . .	451
McNaboe <i>v.</i> Columbian Mfg. Co. . .	141	Nat'l Surety Co. <i>v.</i> Medlock . . .	366
McQuown, <i>In re</i>	212, 216	Nebola <i>v.</i> Minnesota Iron Co. . .	148
McVity <i>v.</i> Tranouth	363	Neff, <i>In re</i>	364
Maddox, Metz <i>v.</i> (189 N. Y. 460)		Nelson & Sons, Ltd. <i>v.</i> Nelson	
	138, 145, 216	Line, Liverpool, Ltd.	217, 540
Malone <i>v.</i> Williams	149	New York Bureau of Information	
Malta Vita Pure Food Co.,		<i>v.</i> Ridgway-Thayer Co.	60
Rhoades <i>v.</i>	290	New York City R. Co., Bondy <i>v.</i>	445
Malvern Urban Dist. Council,		New York City Ry., People <i>v.</i>	
Fergusson <i>v.</i>	633	(57 N. Y. Misc. 114).	279, 293
Manhattan Ry., Taggart <i>v.</i> (57		New York El. R. R. Co., Roose-	
N. Y. Misc. 184)	371	velt <i>v.</i>	629
Mansell <i>v.</i> Valley Printing Co. . .	634	Newport Amusement Ass'n,	
Marr <i>v.</i> Marr	51, 56	Buenzle <i>v.</i>	541
Marten, Andersen <i>v.</i> ([1908] 1 K.		Nichols <i>v.</i> Minton	287
B. 601)	55, 440	Noar <i>v.</i> Bosse	61
Mason <i>v.</i> Intercolonial Ry. . . .	545	Noble <i>v.</i> Fickes	451
Massachusetts, Interstate, etc.,		North and South Wales Bank,	
Ry. Co. <i>v.</i> (207 U. S. 79)	216	Macbeth <i>v.</i> ([1908] 1 K. B. 13)	
Mayor, etc., of Baltimore, West-			214, 538
ern Md. T. R. <i>v.</i>	364	North Carolina Corp. Comm.,	
Mayor, etc., of Paterson, Pater-		Atlantic, etc., R. R. Co. <i>v.</i>	49, 56
son, etc., Co. <i>v.</i>	372	Northern Pac. R. R. Co. <i>v.</i> City	
Major of Bayonne, Lang <i>v.</i> . . .	449	of Seattle	292

TABLE OF CASES.

xlv

	PAGE		PAGE
Northern Pac. Ry. Co., Southern, etc., Co. v.	59	Roger's Estate, <i>In re</i>	222
Northrup, <i>In re</i>	141	Rogers v. Ayres	219
O'Brien, Felkel v.	434, 452	Roosevelt v. New York El. R. R. Co.	629
Ogden v. Ogden	365	Rosenberg v. Haggerty	372
Olmsted v. Olmsted	443	Rouse v. Thompson	215
O'Neill v. Star Co.	448	Rutland R. Co., Lawrence v.	444
Opinion of the Justices	62	Ryan, Smith v.	631
Oregon, Muller v.	544	St. Louis, etc., Ry. Co. v. Randle	539
Painter v. Napoleon Township	534, 538	St. Paul, etc., Ry. Co., City of Grafton v.	288
Paterson, etc., Co. v. Mayor, etc., of Paterson	372	Salaman, <i>In re</i>	360, 369
Pearson & Son, Ltd. v. Lord Mayor, etc., of Dublin	218	Salting, Commissioner of Stamp Duties v.	221
Peck Hardware Co., Depew v.	286	Schlesinger v. Gilhooly	136, 144
People v. Feitner	295	v. Lehmaier	451
v. Flynn	144	Schroeder, Illinois Steel Co. v.	208, 215
v. Healy	371	Schuler v. Henry	627
v. New York City Ry. (57 N. Y. Misc. 114)	279, 293	Seaboard, etc., Ry. Co. v. Rail- road Commission of Alabama	215
v. Reardon	621, 636	Seabrook v. Grimes	635
v. Wells	353, 373	Sears v. Sears	452
v. Williams	62	Security Warehousing Co. v. Hand	61
Perth Amboy Trust Co. v. Perth Amboy	356, 367	Selover, etc., Co., Finnes v.	365
Pfaffinger, <i>In re</i>	537	Seus, Diamond Stone-Sawing Ma- chine Co. v.	544
Phillips, Mills & Co., Davis v.	222	Shaw, Richardson v.	627
Pickering, Johnson v. ([1908] 1 K. B. 1)	64, 223	Siler, Illinois Central R.R. Co. v.	293
Porter, State v.	220	Simpson-Crawford Co. v. Borough of Atlantic Highlands	618, 634
Post Pub. Co., Merrill v.	448	Sirkin v. Fourteenth St. Store	541
Powell v. Yearance	286	Skirrow, Dibden v.	368
Prescott Nat'l Bank v. Head	63	Slade v. Chaine	546
Press Pub. Ass'n, Waite v.	148	Smart, Codville Georgeson Co. v.	292
Providence Journal Co., <i>In re</i>	366	Smith, Collins v. (11 Ont. Wkly. Rep. 350)	544
Railroad Commission of Alabama, Seaboard, etc., Ry. Co. v.	215	v. Ryan	631
Railroad Commission of Ohio v. Hocking Valley Ry. Co.	442	Soebel v. Boston El. Ry. Co.	449
Ramsdill, Matter of	435, 450	Southern, etc., Co. v. Northern Pac. Ry. Co.	59
Randle, St. Louis, etc., Ry. Co. v.	539	Southern Pac. Co., Coyne v.	207, 215
Reardon, People v.	618, 636	Southern Ry. Co., Durden v.	143
Redmon, State v.	372	German, etc., Ins. Co. v.	289
Reed, Dockstader v.	446	v. Tift	59
Reinboth, <i>In re</i>	441	Sowerby, Kellogg v.	546
Reynolds v. Davis	635	Spaulding v. Grundy	222
Rhoades v. Malta Vita Pure Food Co.	290	Spiers v. Hunt ([1908] 1 K. B. 720)	369
Richardson v. Graham	359, 368	Squire v. Learned	60
v. Shaw	627	Star Co., O'Neill v.	448
Ridgway-Thayer Co., New York Bureau of Information v.	60	Starin, Molloy v.	441
Riley, Williams v.	220	State, Dozier v.	632
Robinson, Challoner v.	291	Jordan v.	56
Rockey, Antioch Coal Co. v.	284	State of New York, Wheeler v.	443
		State of Vermont, Consolidated Rendering Co. v.	354, 365, 366

	PAGE		PAGE
State <i>v.</i> Felton	622, 630	United States, Armour Packing Co. <i>v.</i>	135, 147, 542
<i>v.</i> Great Northern Ry. Co.	205, 215	Biddle <i>v.</i>	437, 447
<i>v.</i> Lancaster	452	Fidelity, etc., Co.	
<i>v.</i> Landrum	547	Henningsen <i>v.</i>	545
<i>v.</i> Muncie Pulp Co.	223	Great Northern Ry. Co. <i>v.</i>	223, 545
<i>v.</i> Porter	220	<i>v.</i> Chamberlain (156 Fed. 881)	283, 295
<i>v.</i> Redmon	372	<i>v.</i> Chicago, etc., Ry. Co.	294
<i>v.</i> Superior Court of Whitman County	628	<i>v.</i> Colorado, etc., R. Co.	447
<i>v.</i> Thompson	633	<i>v.</i> Illinois Central R. R. Co.	294
<i>v.</i> Walton	217	Wharton <i>v.</i>	139, 146
Stephens and Sons, Greenshields, etc., Co. <i>v.</i>	369	University of the South, Jetton <i>v.</i>	617, 634
Stephens <i>v.</i> City of Port Huron	533, 546	Urban <i>v.</i> Tysyka	149
Stewart, Charles <i>v.</i>	623, 633	Valley Printing Co., Mansell <i>v.</i>	634
Stolzenbach, American Soda Fountain Co. <i>v.</i>	535, 541	Vanderbilt <i>v.</i> Mitchell	54, 58
Straus, Hatfield <i>v.</i>	221	Victor Talking Mach. Co., Leeds, etc., Co. <i>v.</i>	150
Sturges, Myers <i>v.</i>	540	Wabash R. R. Co. <i>v.</i> Adelbert College	433, 446
Sugerman, Thomas <i>v.</i>	538	Wagner, Gould <i>v.</i> (82 N. E. 10)	146
Superior Court of Whitman County, State <i>v.</i>	628	Waite <i>v.</i> Press Pub. Ass'n	148
Supreme Council A. L. H., Atty.-Gen. <i>v.</i>	214	Walker, <i>In re</i>	147
Symon, Emanuel <i>v.</i> ([1908] 1 K. B. 302)	285	Wallace <i>v.</i> Wallace	146, 632
Taggart <i>v.</i> Manhattan Ry. (57 N. Y. Misc. 184)	371	Wallingford <i>v.</i> Kaiser	629
Taylor, Freret <i>v.</i>	55	Walton, State <i>v.</i>	217
Tennessee Copper Co., Georgia <i>v.</i>	132, 144	<i>v.</i> Walton	151
Territory of Hawaii <i>v.</i> Honolulu, etc., Co.	542	Ward Lumber Co. <i>v.</i> Henderson-White Mfg. Co.	539
The Europa	442	Waters & Co. <i>v.</i> Gerard	147
The Hamilton	357, 363	Webb, etc., Co., Eastern, etc., Co. <i>v.</i>	137, 151
The Jefferson	634	Wedmore, <i>In re</i>	60
The Sitka	367	Wells, Burke <i>v.</i>	353, 373
Thomas <i>v.</i> Guarantee, etc., Co.	439, 449	People <i>v.</i>	353, 373
<i>v.</i> Sugerman	538	Werckmeister, American Tobacco Co. <i>v.</i>	286
Thompson, Rouse <i>v.</i>	215	West Leigh Colliery Co. <i>v.</i> Tunnicliffe and Hampson	367
State <i>v.</i>	633	West Virginia, Braxton County Court <i>v.</i>	438, 444
Through Routes and Through Rates, In the Matter of	142	Westchester Fire Ins. Co., Irvin <i>v.</i>	631
Tift, Southern Ry. Co. <i>v.</i>	59	Western Md. T. R. Co. <i>v.</i> Mayor, etc., of Baltimore	364
Tilton <i>v.</i> Tilton	291	Western Union Tel. Co. <i>v.</i> Chiles	59
Tranouth, McVity <i>v.</i>	363	Wharton <i>v.</i> United States	139, 146
Tucker <i>v.</i> Atlantic, etc., Co. . . .	363	Wheeler <i>v.</i> State of New York	443
Tunncliffe and Hampson, West Leigh Colliery Co. <i>v.</i>	367	Whipple <i>v.</i> Gorsuch	149
Tysyka, Urban <i>v.</i>	149	Williams, Malone <i>v.</i>	149
Umbreit, Disconto Gesellschaft <i>v.</i>	537	People <i>v.</i>	62
Union Traction Co., Kinsey <i>v.</i>	58	<i>v.</i> Lobban	288
United States, Adair <i>v.</i> (208 U. S. 161)	370		

TABLE OF CASES.

xlvii

	PAGE		PAGE
Williams v. Riley	220	Yangtze Insurance Ass'n v. In-	
Wilson v. Carnley ([1908] 1 K. B.		demnity, etc., Co.	636
729)	58, 447	Yates v. Jones Nat'l Bank . . .	145
Winter, Capell v.	53, 64	Yeager v. Bank of Kentucky . .	542
Wisner v. First Nat'l Bank . . .	626	Yearance, Powell v.	286
Wood, <i>Ex parte</i>	204, 220	Young, <i>Ex parte</i> (209 U. S. 123)	
Woolverton v. Fidelity, etc., Co.	370		527, 540
Wright, Central of Georgia Ry. v.	285		
Wyman, Donnell Mfg. Co. v.			
(156 Fed. 415)	150		

INDEX TO LEADING LEGAL ARTICLES

APRIL 15, 1907—APRIL 15, 1908.

Prepared in collaboration with the Harvard Law School Library. Titles are rearranged so as to place the key-word first. Abbreviations are those used in Jones' Index to Legal Periodicals. References in heavy-faced type are to editorial comment in the REVIEW.

- Accident Insurance as Affecting the Measure of Damages. *J. Campbell Lorimer*. Contending that the rule that accident insurance should not be deducted from damages ought to apply to the case of injuries causing death. 19 JURID. REV. 58.
- Administrator's Action for Death, Contributory Negligence of the Beneficiary as a Bar to an. *John H. Wigmore*. 2 ILL. L. REV. 487. See p. 636.
- Admiralty Jurisdiction over Maritime Treaty Rights. *Anon.* Discussing a recent case denying jurisdiction over a vessel on a river between the United States and Canada. 43 CAN. L. J. 345.
- Adverse Possession, Title by. *Charles Stuart*. Maintaining that restrictive covenants are binding on one who gets title by adverse possession even though not binding on a disseisor. 19 JURID. REV. 66. See 21 HARV. L. REV. 139.
- Agreed Valuation as Affecting the Liability of Common Carriers for Negligence. *Henry Wolf Bihl*. 21 HARV. L. REV. 32.
- Alienation, Powers of Sale as Affecting Restraints on. *Frederick Dwight*. 7 COLUM. L. REV. 589. See p. 299.
- Allegiance in Constitutional and International Law, Citizenship and. *W. W. Willoughby*. 1 AM. J. OF INT. L. 914.
- Alteration in Instruments. *S. Vaidyanatha Iyer*. 6 CAL. L. J. 21n. See 7 HARV. L. REV. 1; 18 *ibid.* 105, 165.
- Appeal, Taking Advantage of Variance on. *Albert Martin Kales*. Analyzing the Illinois cases. 2 ILL. L. REV. 78.
- Appellate Courts, The Power of, to Cut Down Excessive Verdicts. *Robert L. McWilliams*. Contending that the power should exist only when passion or prejudice is shown. 64 CENT. L. J. 267.
- Appellate Tribunal, Right of, to Assume Charge of Elections by Writ of Injunction — The Tool Case of Colorado. *Edward P. Costigan*. Contesting the right. 64 CENT. L. J. 402. See 20 HARV. L. REV. 157.
- Arbitration, A Permanent Tribunal of International; its Necessity and Value. *R. Floyd Clarke*. 1 AM. J. OF INT. L. 342.
- Armstrong Committee's Legislation, A Statement concerning Mr. Samuel B. Clarke's Article entitled "Defects of the, Relating to the Dividends of Mutual Life Insurance Policy-Holders" and Mr. James McKeen's Answer. *William Trenholm*. 42 AM. L. REV. 1.
- Armstrong Committee's Life Insurance Legislation, Mr. Samuel B. Clarke and the. *James McKeen*. Answering an article in 41 AM. L. REV. 161. 41 AM. L. REV. 321.
- Assumpsit as Affecting the Right of Action of the Beneficiary, Limitations of the Action of (Continued). *Crawford D. Hening*. 56 U. P. L. REV. 73.
- Attorneys, Statements by, in Arguments, Pleadings and Briefs Pertaining to Rulings and Decisions, as Contempt of Court. *Sumner Kenner*. 65 CENT. L. J. 331.
- Australian Constitution, The Privy Council and the. *W. Harrison Moore*. Adversely criticizing a recent holding that the salary of an Australian officer is subject to taxation by Victoria. 23 L. QUAR. REV. 373. See 20 HARV. L. REV. 494.
- Automobile, The Status of the. *H. B. Brown*. Contending that the law should require a higher degree of care from automobile drivers, and punish their negligence more severely. 17 YALE L. J. 223.
- Bank Accounts with Minors. *Thornton Cooke*. Arguing that banks are protected in making such accounts. 24 BANK. L. J. 433.

- Bank Capital, Exemption of United States Securities from the Taxation of. *Anon.* 24 Bank. L. J. 417.
- Bank Shareholder's Right of Inspection. *Anon.* Collecting the New York cases and showing that the allowance of the right is still largely discretionary with the court. 25 Bank. L. J. 17.
- Bankrupt Act of 1898, The Separate Estates of Non-Bankrupt Partners in the Bankruptcy of a Partnership under the. *J. D. Brannan.* 20 HARV. L. REV. 589.
- Bankruptcy Act, Proposed Amendments to the National. *Anon.* 5 Law & Com. 525.
- Bankruptcy (Scotland) Bill, 1907, The. I, II. *W. W.* Summarizing the bill. 23 Scot. L. Rev. 248, 284.
- Bankruptcy, Corporations Subject to. *R. Jackson Cram.* Enumerating the classes of corporations that come within the terms of the National Act. 19 Green Bag 529.
- Bankruptcy Law, The Merits and Demerits of the. *George C. Holt.* 5 The Law 425.
- Bar in New York, Admission to the. *Frank Sullivan Smith.* Describing the past and present requirements. 16 Yale L. J. 514.
- Bays, Claims of Territorial Jurisdiction in Wide. *A. H. Charteris.* 16 Yale L. J. 471. See p. 65.
- Beneficiary, Limitations of the Action of Assumpsit as Affecting the Right of Action of the. See *supra*, under Assumpsit.
- Bidding, Competitive, in Letting Municipal Contracts for Street Paving when Patented or Monopolized Articles or Materials are Involved, as a Phase of the Case of the Will of the Law v. the Will of the Judge. *Eugene McQuillin.* 65 Cent. L. J. 198.
- Bill of Lading, The Collection of a Draft on a Forged. *Anon.* Discussing the question of the liability of the collecting agency. 24 Bank. L. J. 337.
- Bills of Exchange and the Doctrine of Estoppel. *Anon.* Discussing the possibility of an estoppel against the maker of an overdrawn bill. 51 Sol. J. 621.
- Bills of Lading in Interstate Commerce. *Thomas B. Paton.* Discussing their present standing and advocating changes. 24 Bank. L. J. 371.
- Bills of Lading, The Lake Situation and. *Anon.* Contending that bills "care consignee" are not good security. 24 Bank. L. J. 697.
- Board of Railway Commissioners for Canada, The Work and Powers of the. *Robert C. Smith.* 20 Green Bag 30.
- Boyce, Evolution of the Law Relating to. *Robert L. McWilliams.* 41 Am. L. Rev. 336.
- Boycotts, Strikes, and Similar Unlawful Acts, Injunctions against. *F. C. Donnell.* General discussion. 65 Cent. L. J. 273.
- Bridges, Damages in the Publicization of. *Anon.* Discussing the proper measure of damages when a toll bridge is taken by eminent domain. 12 The Forum 37.
- Brokers, Recovery in New York of Interest in Excess of Six Per Cent Paid by Brokers on Money Borrowed to Purchase and Carry Stocks on Margin. *Harold C. McCollom.* 8 Colum. L. Rev. 281. See p. 638.
- Business Policies Inconsistent with Public Employment. *Bruce Wyman.* 20 HARV. L. REV. 511.
- Calvo and Drago Doctrines, The. *Amos S. Hershey.* 1 Am. J. of Int. L. 26.
- Canada, Industrial Peace Legislation in. *John King.* Discussing the practical working of the Industrial Disputes Investigation Act of 1907. 19 Green Bag 694.
- Canada, The Work and Powers of the Board of Railway Commissioners for. See *supra*, under Board.
- Canadian Constitution, The. *John S. Ewart.* Maintaining that Canada though in form a colony is practically independent. 8 Colum. L. Rev. 27.
- Capital Punishment in France, The Abolition of. *Maynard Shipley.* An historical sketch. 41 Am. E. Rev. 561.
- Capture, Would Immunity from, during War, of Non-Offending Private Property upon the High Seas, be in the Interest of Civilization? *C. H. Stockton.* Maintaining that in some cases immunity might not be advisable. 1 Am. J. of Int. L. 930.
- Case Book, The Next Step in the Evolution of the. *Albert Martin Kales.* 21 HARV. L. REV. 92.
- Central American Peace Conference of 1907. *James Brown Scott.* 2 Am. J. of Int. L. 121.
- Charities, Gifts to. Section XI, Act April 26th, 1855. *Anon.* Collecting the Pennsylvania authorities. 12 The Forum 167.
- Child Labor, Beveridge, Bill and the United States as *Parens Patriae*, The. *Andrew Alexander Bruce.* Contending that the bill is unconstitutional. 5 Mich. L. Rev. 627. See 20 HARV. L. REV. 658.

- Circuit Court of the United States, Illegality of the Action of the, in Enjoining the Virginia State Corporation Commission from Enforcing a Two Cent Rate Affecting the Intra-State Business of Railroads. *E. Hilton Jackson*. Arguing that the proceedings of the Commission were judicial and therefore should not have been restrained. 13 Va. L. Reg. 417.
- Citizens Abroad, Diplomatic Protection of. *Gaston de Leval*. Suggesting a system to ensure protection. 42 L. J. 607, 617.
- Citizenship and Allegiance in Constitutional and International Law. See *supra*, under Allegiance.
- Civil Service Legislation, Constitutionality of. *Harold Harper*. 22 Pol. Sci. Quar. 630.
- Collateral Attack on Incorporation. B. In General. *Edward H. Warren*. 21 HARV. L. REV. 305.
- College Fraternity Chapter, The Legal Status of a. *Olcott O. Partridge*. Discussing all the rights and liabilities of members and their method of handling property. 42 Am. L. Rev. 168.
- Comment, Fair, and Qualified Privilege. *Norman de H. Rowland*. Maintaining that fair comment is a qualified privilege. 4 Comm. L. Rev. 202. See 20 HARV. L. REV. 152.
- Commerce Clause, Corporations and the. *Smith W. Bennett*. Discussing the power of Congress to create corporations to engage in interstate commerce and to deny that power to the states. 52 Oh. L. Bul. 379; 35 Nat. Corp. Rep. 588.
- Commerce Clause, The Growth of the. *John W. Davis*. Analyzing the extensions attempted in recent acts. 15 Am. Lawyer 171, 213.
- Commerce, The Development of the Federal Power to Regulate. *Philander C. Knox*. Contending that Congress cannot prohibit, for reasons unconnected with interstate commerce, the shipment of articles lawfully produced. 17 Yale L. J. 139.
- Commissions, Estate Agents'; Letting and Subsequent Sale. *J. K. F. Cleave*. 23 L. Mag. & Rev. 48. See p. 297.
- Common Carriers, Agreed Valuation as Affecting the Liability of, for Negligence. See *supra*, under Agreed Valuation.
- Common Employment, The Doctrine of, in England and Canada. *J. P. McGregor*. A study in comparative legislation and jurisprudence. 6 Can. L. Rev. 24, 61, 110, 158, 324.
- Common Law and Legislation. *Roscoe Pound*. 21 HARV. L. REV. 383.
- Common Law Jurisdiction of the United States Courts, The. *Allon B. Parker*. 17 Yale L. J. 1.
- Common Law Remainders, Professor Kales and. *Joseph W. Bingham*. 5 Mich. L. Rev. 497. See 20 HARV. L. REV. 243.
- Common Law, Short Studies in the. III. Possession. *A. Inglis Clark*. Summarizing the elements of possession, particularly with reference to criminal law. 5 Comm. L. Rev. 12.
- Common Law, The Influence of National Character and Historical Environment on the Development of the. *James Bryce*. 19 Green Bag 569.
- Competition, Legislative and Judicial Development of, Contrasted. *Merritt Starr*. Adversely criticizing the legislation. 40 Chi. Leg. N. 7, 16.
- Competition, The Justification of Fair. *Bruce Wyman*. 19 Green Bag 277.
- Consideration, Void, Illegal or Unenforceable. *W. P. Rogers*. 17 Yale L. J. 338. See p. 549.
- Constitution and Obscenity Postal Laws, The. *Theodore Schroeder*. Maintaining that the present postal laws are so uncertain as to be unconstitutional. 69 Alb. L. J. 334.
- Constitution and the Corporations, The. *Charles F. Amidon*. Contending that the Constitution can and should be so interpreted as to allow federal control of corporations of national scope. 14 The Bar 19.
- Constitution of the United States, Is a provision for the Initiative and Referendum Inconsistent with the? *W. A. Cousts*. 6 Mich. L. Rev. 304.
- Constitution of the United States, The Eleventh Article of Amendment to the. *William D. Guthrie*. 8 Colum. L. Rev. 183. See 20 HARV. L. REV. 245. See p. 527.
- Constitution, The Elasticity of the. *Ernest Bruncken*. Contending that the Constitution should be interpreted according to modern beliefs. 20 Green Bag 18.
- Constitution, The Extent and Limitations of the Treaty-Making Power under the. *Chandler P. Anderson*. An exhaustive historical review of the authorities. 1 Am. J. of Int. L. 636.
- Constitution, The Nation and the. *Charles F. Amidon*. Contending that the interpretation of the Constitution should change with changing conditions. 19 Green Bag 594.

- Constitution, The Theory and Practice of the. *Thos. B. Flint*. Showing that the Canadian government is essentially like that of Great Britain. 28 Can. L. T. & Rev. 114.
- Constitution, The True—Suggestions towards its Interpretation (Continued). *Joseph Culbertson Clayton*. Contending that the federal government should have all the powers inherent in nationality not withheld by the Constitution. 15 Am. Lawyer 281.
- Constitutional Aspect of the Senatorial Debate upon the Rate Bill, The. *James Wallace Bryan*. A brief historical survey of railroad rate legislation and discussion in detail of the Hepburn-Dolliver Bill. 41 Am. L. Rev. 801.
- Constitutional Domains, Federal and State. *F. L. Stow*. Showing why the case of *McCulloch v. Maryland* does not apply in Australia. 5 Comm. L. Rev. 3. See 20 HARV. L. REV. 494.
- Constitutional Limitation upon Rate Regulation, Reasonableness of Maximum Rates as a. *Frank M. Cobb*. 21 HARV. L. REV. 175.
- Constitutional Question Suggested by the Trial of William D. Haywood, A. *Charles P. McCarthy*. 19 Green Bag 636. See p. 224.
- Constitutionality of Civil Service Legislation. See *supra*, under Civil Service.
- Constitutionality of Federal Legislation Concerning Employer and Employee Engaged in Interstate and Foreign Commerce, The. *Carl V. Wisner*. Maintaining that the act is constitutional. 5 Mich. L. Rev. 639. See 20 HARV. L. REV. 481, 651.
- Constitutionality of Statutes Authorizing Subservice of Process upon Corporations. *W. A. Conitts*. 66 Cent. L. J. 109. See p. 453.
- Constructive Trusts Based upon the Breach of an Express Oral Trust of Land. *James Barr Ames*. 20 HARV. L. REV. 549.
- Contempt of Court, Criminal and Civil. *Joseph H. Beale*. 21 HARV. L. REV. 161.
- Contempt of Court, Statements by Attorneys in Arguments, Pleadings and Briefs Pertaining to Rulings and Decisions as. See *supra*, under Attorneys.
- Contempt, The Law of, in India. *Sarat Chandra Lahiri*. 17 Madras L. J. 387.
- Contingent and Vested Remainders. *Albert Martin Kales*. Answering a criticism of a former article by Mr. Kales. 8 Colum. L. Rev. 245. See 20 HARV. L. REV. 243.
- Contingent Future Interests in Illinois, Vested and. *Albert Martin Kales*. Analyzing the cases where the classes of interests are distinguished and showing the present confusion in Illinois. 2 Ill. L. Rev. 301.
- Contraband of War. *W. R. Kennedy*. Showing the inadequacy of present rules on the subject. 24 L. Quar. Rev. 59.
- Contract, Word "Not" as a Test of Equity Jurisdiction to Enjoin a Breach of. *Henry Schofield*. Reviewing the authority on implied negative contracts and arguing that the distinction made in recent Illinois cases between express and implied contracts is not to be supported. 2 Ill. L. Rev. 217. See 19 HARV. L. REV. 476.
- Contractor under the Law of Illinois, The Independent. *Barry Gilbert*. Collecting the Illinois decisions. 2 Ill. L. Rev. 361.
- Contracts, Entire, Right of Recovery for Partial Performance of. *Graham B. Smedley*. A good collection of authority. 65 Cent. L. J. 292.
- Contractual Obligations Attaching to Land. *W. Strachan*. 23 L. Quar. Rev. 432.
- Contributory Negligence. *Francis H. Bohlen*. 21 HARV. L. REV. 233.
- Contributory Negligence, Imputed, The Doctrine of, as Applied to Persons *sui juris*. *John T. Marshall*. Discussing the effect of principles of agency. 64 Cent. L. J. 347.
- Contributory Negligence of the Beneficiary as a Bar to an Administrator's Action for Death. See *supra*, under Administrator's.
- Conversion, The Test of. *George Luther Clark*. 21 HARV. L. REV. 408.
- Corporate Director, The Liability of the Inactive. *H. A. Cushing*. Maintaining that the standard of care imposed upon such directors does not sufficiently protect the investing public. 8 Colum. L. Rev. 18. See 19 HARV. L. REV. 613.
- Corporate Directors, Liability of. *Frederick Dwight*. Showing how lax the law is with directors who fail in their duties. 17 Yale L. J. 33. See 15 HARV. L. REV. 479.
- Corporation Law, Influence of Railroad Decisions in. *Richard Selden Harvey*. 15 Am. Lawyer 315.
- Corporation Promissory Note, What is a? *Anon.* Carefully collecting the authorities. 24 Bank. L. J. 255.
- Corporation, Right of a Stockholder, Suing in Behalf of a, to Complain of Misdeeds Occurring Prior to his Acquisition of Stock. *Murray Seasongood*. 21 HARV. L. REV. 195.
- Corporations and the Commerce Clause. See *supra*, under Commerce Clause.

- Corporations, Constitutionality of Statutes Authorizing Subservice of Process upon. See *supra*, under Constitutionality.
- Corporations, Foreign, The Status of, and the Legislature. II. *E. Hilton Young*. 23 L. Quar. Rev. 290.
- Corporations, Rights of Life Tenants and Remaindermen to Distributions of Stock and Corporate Assets made by, to their Stockholders. *Carroll G. Walter*. 42 Am. L. Rev. 25. See 20 HARV. L. REV. 147.
- Corporations Subject to Bankruptcy. See *supra*, under Bankruptcy.
- Corporations, Suits by Foreign. *Raymond D. Thurber*. Collecting authorities on rights of non-registered foreign corporations to sue. 9 Bench & Bar 54.
- Corporations, The Constitution and the. See *supra*, under Constitution.
- Courts and Judges, Validity of Statutes Conferring Executive and Legislative Powers on. *W. W. Thornton*. Digesting the cases. 66 Cent. L. J. 24. See 21 HARV. L. REV. 138.
- Courts from the Revolution to the Revision of the Civil Code, The. *William H. Lloyd, Jr.* A history of the development of Pennsylvania courts. 56 U. P. L. Rev. 88.
- Cross-Examination (Continued). *Anon.* Stating clearly the principles in force in the English courts. 71 J. P. 385, 397, 409.
- Damages, Accident Insurance as Affecting the Measure of. See *supra*, under Accident Insurance.
- Damages, Allowance of Special, in Actions for Wrongful Dismissal of Servants. *C. B. Labatt*. Collecting the authorities on the allowance of consequential and incidental damages. 43 Can. L. J. 593.
- Damages in the Publicization of Bridges. See *supra*, under Bridges.
- Damages in the Publicization of Turnpikes. *Anon.* Discussing the proper method of valuation. 12 The Forum 67.
- Dangerous Machinery, The Effect of Legislation Requiring the Master to Guard. *George W. Payne*. 66 Cent. L. J. 157.
- Death, Contributory Negligence of the Beneficiary as a Bar to an Administrator's Action for. See *supra*, under Administrator's.
- Death, The Effect of the Presumption of, upon Marketability of Title to Real Estate. *W. F. Meier*. 19 Green Bag 713. See p. 374.
- Death upon the High Seas, Enforcement of a Right of Action Acquired under Foreign Law for. I, II. *G. Philip Wardner*. 21 HARV. L. REV. 1, 75.
- Debenture-Holders and Execution Creditors. *Anon.* Collecting the recent English authorities. 29 L. Stud. J. 240.
- Dedication of Land to Public Use by Lessees for Years. *Anon.* 51 Sol. J. 509. See p. 151.
- Deeds in America, The Origin of the System of Recording. *Joseph H. Beale*. 19 Green Bag 335.
- De Facto Office. *K. Richard Wallach*. 22 Pol. Sci. Quar. 460. See p. 153.
- Department of State, The History of the. I. The Department of Foreign Affairs. *Gaillard Hunt*. 1 Am. J. of Int. L. 867.
- Devises of Real Estate, The Effect of Part Payment as against. I. *Anon.* Maintaining that part payment of a debt should, as against devisees of the debtor's realty, waive the statute of limitations. 51 Sol. J. 407. See 19 HARV. L. REV. 57; 20 *ibid.* 332.
- Diplomatic Protection of Citizens Abroad. See *supra*, under Citizens Abroad.
- Director, The Liability of the Inactive Corporate. See *supra*, under Corporate.
- Directors, Liability of Corporate. See *supra*, under Corporate.
- Dishonor, Notice of, by Mail to Indorser in Same Place when Day Following Dishonor is Saturday. *Anon.* Contending that notice on a holiday is valid under the Negotiable Instruments Law. 24 Bank. L. J. 691.
- Divorce Decrees, Foreign, in New York. *Raymond D. Thurber*. Attempting to reconcile *Atherton v. Atherton* with *Haddock v. Haddock*. 10 Bench and Bar 82. See 19 HARV. L. REV. 586.
- Domicil. *G. Addison Smith*. 32 L. Mag. & Rev. 268.
- Domicil, Matrimonial. *Anon.* 11 Bench and Bar 37. See p. 296.
- Draft on a Forged Bill of Lading, The Collection of a. See *supra*, under Bill of Lading.
- Drago Doctrines, The Calvo and. See *supra*, under Calvo.
- Due Process of Law. *Hannis Taylor*. Summarizing the position of the Supreme Court. 41 Am. L. Rev. 354.
- Due Process of Law, Concerning Uncertainty and. *Theodore Schroeder*. Contending that we now enforce criminal statutes so uncertain in terms that the courts are forced to exercise legislative powers. 66 Cent. L. J. 2.

- Dying Declarations. *Wilbur Larremore*. Contending that under modern conditions this exception to the hearsay rule should be as restricted as possible. 41 Am. L. Rev. 660.
- Eight-Hour Law with Respect to Government Contracts. *Anon.* Adversely criticizing a recent case holding the federal eight-hour law constitutional. 35 Nat. Corp. Rep. 301.
- Elections, Right of Appellate Tribunal to Assume Charge of, by Writ of Injunctions — The Tool Case of Colorado. See *supra*, under Appellate Tribunal.
- Eleventh Amendment, The. *Herbert S. Hadley*. Contending that a federal court cannot enjoin an official act of a state officer. 66 Cent. L. J. 71. See 20 HARV. L. REV. 245; 21 *ibid.* 527.
- Employer and Employee Engaged in Interstate and Foreign Commerce, The Constitutionality of Federal Legislation Concerning. See *supra*, under Constitutionality.
- Employer, The Liability of the. *W. E. Wals*. Maintaining that a proper application of the doctrine of *respondeat superior* would make employers' liability legislation unnecessary. 1 Me. L. Rev. 4.
- English Constitution, Origin of the. I. *George Burton Adams*. Tracing the origin to feudalism and the feudal contract enunciated in the Magna Charta. 13 Am. Hist. Rev. 229.
- Equitable Life Assurance Society; a Possible Remedy to Cancel the Stock Control. *Robert Rentons Reed*. Comparing the policy holders to *cestuis que trustent*. 19 Green Bag 399.
- Equitable Mortgagees, The Position of. *Anon.* 51 Sol. J. 585. See 21 HARV. L. REV. 53.
- Equity Jurisdiction, Word "Not" as a Test of, to Enjoin a Breach of Contract. See *supra*, under Contract.
- Error of Law. *Corry Montague Stadden*. 7 Colum. L. Rev. 476. See p. 225.
- Estoppel, Bills of Exchange and the Doctrine of. See *supra*, under Bills of Exchange.
- Evidence, When is a Complaint by the Person against Whom an Offense is Alleged to have been Committed Admissible in? *William C. Maude*. 71 J. P. 411.
- Execution Creditors, Debenture-Holders and. See *supra*, under Debenture-Holders.
- Executive Control of the Legislature, The (Concluded). *James D. Barnett*. Collecting the cases on the executive's veto power. 41 Am. L. Rev. 384.
- Expatriation by Marriage, Woman's. *C. A. Hereshoff Bartlett*. Discussing the subject generally and maintaining in particular that a United States statute allowing woman's expatriation by marriage is unconstitutional. 33 L. Mag. & Rev. 150.
- Express Companies, Can They be Compelled to Make Personal Delivery? *George W. Payne*. Collecting authorities. 66 Cent. L. J. 275.
- Expropriation by International Arbitration. *Charles Noble Gregory*. 21 HARV. L. REV. 23.
- Fair Comment and Qualified Privilege. See *supra*, under Comment.
- Fair Competition, The Justification of. See *supra*, under Competition.
- Federal and State Constitutional Domains. See *supra*, under Constitutional.
- Federal Authorities, The Acquisition of State Land by the. *Acland Giles*. Discussing the power of the Australian federation to take land by eminent domain from the Australian states. 5 Comm. L. Rev. 49.
- Federal Power to Regulate Commerce, The Development of the. See *supra*, under Commerce.
- Fellow Servants' Law, Proposed Changes in the. *George Rice*. Contending that the fellow servant doctrine should be abolished in the case of railroads. 52 Oh. L. Bul. 208.
- Filipino People, The Progress of the, toward Self-Government. *E. W. Kemmerer*. Historical sketch of conditions before, during, and after Spanish control. 23 Pol. Sci. Quar. 47.
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- Forged Bill of Lading, The Collection of a Draft on a. See *supra*, under Bill of Lading.
- France, The Abolition of Capital Punishment in. See *supra*, under Capital Punishment.
- Future Interests in Illinois, Vested and Contingent. See *supra*, under Contingent.
- Germany, Methods Followed in, by the Historical School of Law. *Rudolph Leonhard*. 7 Colum. L. Rev. 573.
- Gross Receipts, The State Tax on Illinois Central — Another View. *James Parker Hall*. Maintaining that such tax is constitutional. 2 Ill. L. Rev. 21. See 20 HARV. L. REV. 503.
- Hague Conference, The Development of International Law by the Second. *Edward G. Elliott*. 8 Colum. L. Rev. 96.

- Hague Conference, The Legal Results of the. *Norman Bentwich*. Especially considering the possible adoption of an international prize court. 42 L. J. 664.
- Hague Conference, The Work of the Second. *W. F. Dodd*. 6 Mich. L. Rev. 294.
- Hague Convention concerning the Rights and Duties of Neutral Powers and Persons in Land Warfare. *Antonio S. de Bustamante*. 2 Am. J. of Int. L. 95.
- Hague Convention Restricting the Use of Force to Recover on Contract Claims. *George Winfield Scott*. Including a definition of "contract claims." 2 Am. J. of Int. L. 78.
- Hague Peace Conference, The Work of the Second. *James Brown Scott*. 2 Am. J. of Int. L. 1.
- Haywood, William D., A Constitutional Question Suggested by the Trial of. See *supra*, under Constitutional.
- Hostilities, Convention Relative to the Opening of. *Ellery C. Stowell*. Including a collection of all the cases in which hostilities have been begun without a declaration of war. 2 Am. J. of Int. L. 50.
- Illinois Central Gross Receipts, The State Tax on — Another View. See *supra*, under Gross Receipts.
- Illinois Negotiable Instruments Act, The New. *Louis M. Greeley*. 2 Ill. L. Rev. 145.
- Illinois, The Independent Contractor under the Law of. See *supra*, under Contractor.
- Incorporation, Collateral Attack on. B. In General. See *supra*, under Collateral.
- India, The Law of Contempt in. See *supra*, under Contempt.
- Indorser, Notice of Dishonor by Mail to, in Same Place when Day Following Dishonor is Saturday. See *supra*, under Dishonor.
- Industrial Peace Legislation in Canada. See *supra*, under Canada.
- Initiative and Referendum, Is a Provision for the, Inconsistent with the Constitution of the United States? See *supra*, under Constitution.
- Injunctions against Strikes, Boycotts, and Similar Unlawful Acts. See *supra*, under Boycotts.
- Inspection, Bank Shareholder's Right of. See *supra*, under Bank Shareholder.
- Instruments, Alteration in. See *supra*, under Alteration.
- Insurance Companies, Distribution of Surplus by. *Herbert H. Reed*. Statistics showing that life insurance premiums are not equitably calculated. 42 Am. L. Rev. 12.
- Intent, Theory of the Admission of Other Acts than Those Charged to Show. *Anon.* 5 The Law 327.
- Interest, Recovery in New York of Interest in Excess of Six Per Cent Paid by Brokers on Money Borrowed to Purchase and Carry Stocks on Margin. See *supra*, under Brokers.
- International Arbitration, A Permanent Tribunal of; its Necessity and Value. See *supra*, under Arbitration.
- International Arbitration, Expropriation by. See *supra*, under Expropriation.
- International Conflicts, Can any Right of Direct Citation be Given to a State in? *Jacques Dumas*. Maintaining that nations should be compelled to arbitrate. 17 Yale L. J. 365.
- International Congresses and Conferences of the Last Century as Forces Working toward the Solidarity of the World, The. *Simeon E. Baldwin*. 1 Am. J. of Int. L. 565.
- International Differences, Convention for the Peaceful Adjustment of. *Amos S. Hershey*. 2 Am. J. of Int. L. 29.
- International Law, The Development of. *Richard Olney*. An historical sketch. 1 Am. J. of Int. L. 418.
- International Law, The Development of, by the Second Hague Conference. See *supra*, under Hague Conference.
- International Law, The Need of Popular Understanding of. *Elihu Root*. 1 Am. J. of Int. L. 1.
- International Prize Court, An. *Amos S. Hershey*. Discussing the advantages of such a court and the difficulties in the way of its establishment. 19 Green Bag 652.
- International Unions and Their Administration. *Paul S. Reinsch*. An exhaustive treatise on international conventions for economic and business purposes. 1 Am. J. of Int. L. 579.
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- Interstate Commerce, Bills of Lading in. See *supra*, under Bills of Lading.
- Interstate Commerce, State Interference with. *H. P. Burnett*. Careful analysis of the subject with citation of authority. 13 Va. L. Reg. 497.
- Japanese School Question and the Treaty-Making Power, The. *Amos S. Hershey*. 1 Am. Pol. Sci. Rev. 393. See 20 HARV. L. REV. 337.

- Japanese Treaty and the San Francisco School Board Resolution, The Real Question under the. *Elihu Root*. 1 Am. J. of Int. L. 273. See 20 HARV. L. REV. 337.
- Judge-Made Law. *Anon.* Contesting the suggestion of Mr. Hornblower, 7 Colum. L. Rev. 453, that it is better not to codify the law. 35 Nat. Corp. Rep. 613.
- "Judge-Made" Law, A Century of. *William B. Hornblower*. 7 Colum. L. Rev. 453.
- Judicial Decisions, The Relation of, to the Law. *Alexander Lincoln*. 21 HARV. L. REV. 120.
- Judicial Liability. *W. W. Lucas*. A clear statement of the English law on liability of judicial officers for negligence, *mala fides*, etc. 32 L. Mag. & Rev. 417.
- Judicial Remedies in the Regulation of Railway Rates by Public Authority, The Application of. *Fred K. Nielsen*. Contending that the Commission should be merely an advisory body. 65 Cent. L. J. 385.
- Judiciary, The Function of the (Continued). *Percy Bordwell*. Arguing that the Supreme Court should not declare political laws unconstitutional. 7 Colum. L. Rev. 520.
- Jurisdiction in Wide Bays, Claims of Territorial. See *supra*, under Bays.
- Jurisdiction, Recent Controversy as to the British, over Foreign Fishermen More than Three Miles from Shore. *Charles Noble Gregory*. 1 Am. Pol. Sci. Rev. 410. See p. 65.
- Jurisprudence, The Need of a Sociological. *Roscoe Pound*. Urging a scientific treatment of the present sociological tendencies. 19 Green Bag 607.
- Justices of the Peace, The Liability of. *W. W. Lucas*. Classifying the cases in which justices of the peace may be liable criminally or civilly. 33 L. Mag. & Rev. 22.
- Knight Commander Case, The. *Theodore S. Woolsey*. 16 Yale L. J. 566.
- Labor and the Fourteenth Amendment, Demands of. *Roger F. Sturgis*. Arranging the cases upon recent statutes limiting hours, regulating payments, etc. 41 Am. L. Rev. 481.
- Labor Unions, Recent American Decisions and English Legislation Affecting. *Chas. R. Darling*. 42 Am. L. Rev. 200.
- Land, Constructive Trusts Based upon the Breach of an Express Oral Trust of. See *supra*, under Constructive Trusts.
- Land, Contractual Obligations Attaching to. See *supra*, under Contractual Obligations.
- Land, Transfer of, in Old English Law. *Paul Vinogradoff*. 20 HARV. L. REV. 532.
- Larceny and the Perkins Case. *Francis M. Burdick*. Maintaining that criminal intent should have been found. 7 Colum. L. Rev. 387. See 19 HARV. L. REV. 611.
- Larceny of a Man's Own goods. *Anon.* 51 Sol. J. 407.
- Last Clear Chance, The Doctrine of. *George W. Payne*. Summary of the doctrine 66 Cent. L. J. 215.
- Law and Government. *W. Harrison Moore*. Advancing the theory of the artificial persons of the state. 4 Comm. L. Rev. 50.
- Legacies, Appropriation of Trust Funds to. *William C. Smith*. Discussing the right of an executor to appropriate part of testator's estate to pay one legatee before the others. 19 Jurid. Rev. 19.
- Legal Education, Systems in. *John Wurtz*. Attacking the case system for its lack of preliminary dogmatic teaching. 17 Yale L. J. 86.
- Legal Ethics, The Proposed American Code of. *George P. Costigan, Jr.* 20 Green Bag 57.
- Legislation, Common Law and. See *supra*, under Common Law.
- Legislation, The Methods and Conditions of, in our Time. *James Bryce*. Maintaining that the legislature should be relieved by having the power to delegate its powers and by the use of scientific methods. 8 Colum. L. Rev. 157; 20 Green Bag 111.
- Legislature, The Executive Control of the (Concluded). See *supra*, under Executive.
- Lessees for Years, Dedication of Land to Public Use by. See *supra*, under Dedication.
- Letters, The Right to Use. *Anon.* A general discussion based upon the authorities. 52 Sol. J. 5.
- Letting and Subsequent Sale; Estate Agents' Commissions. See *supra*, under Commissions.
- Liability of Members of Voluntary Association, The Personal. *G. A. Endlich*. 55 Am. L. Rev. 337.
- Licences, Property in. *Ernest E. Williams*. 24 L. Quar. Rev. 49.
- Liens on Vessels, Confusion in the Law Relating to Materialmen's. *Fitz-Henry Smith, Jr.* 21 HARV. L. REV. 332.
- Life Insurance Legislation, Mr. Samuel B. Clarke and the Armstrong Committee's. See *supra*, under Armstrong Committee.
- Life Tenants and Remaindermen, Rights of, to Distributions of Stock and Corporate Assets made by Corporations to their Stockholders. See *supra*, under Corporations.

- Liferent, Gifts of, under Powers of Appointment.** *John S. Mackay.* Urging the adoption in Scotland of the English rule that a void remainder under a power of appointment should not invalidate an otherwise good life estate. 19 Jurid. Rev. 245.
- Maitland, Frederic William.** *D. P. Heatley.* 19 Jurid. Rev. 1.
- Maitland, Frederic William.** *M. S.* 22 Pol. Sci. Rev. 282.
- Maitland, Frederic William.** *P. Vinogradoff.* 22 Eng. Hist. Rev. 280.
- Marketability of Title to Real Estate, The Effect of Presumption of Death upon.** See *supra*, under Death.
- Marriage, Woman's Expatriation by.** See *supra*, under Expatriation.
- Master, The Effect of Legislation Requiring the, to Guard Dangerous Machinery.** See *supra*, under Dangerous Machinery.
- Materialmen's Liens on Vessels, Confusion in the Law Relating to.** See *supra*, under Liens.
- Maximum Rates as a Constitutional Limitation upon Rate Regulation, Reasonableness of.** See *supra*, under Constitutional.
- Minerals under a Railway, Compensation for.** *Anon.* Reviewing the cases on a railway's right to support in adjacent minerals. 51 Sol. J. 684.
- Minors, Bank Accounts with.** See *supra*, under Bank Accounts.
- Mohammedan Jurisprudence, Roman Law and.** I, II, III. *Theodore P. Ion.* Comparing the two systems. 6 Mich. L. Rev. 44, 197, 371.
- Moral Duty to Aid Others as a Basis of Tort Liability, The.** I. *Francis H. Bohlen.* 56 U. P. L. Rev. 217.
- Mortgage, The Effect of a Grant of Land by Way of.** *T. Cyprian Williams.* Maintaining that the mortgagor should not be liable for a heriot. 51 Sol. J. 478, 496. See 20 HARV. L. REV. 652.
- Mortgagees, The Position of Equitable.** See *supra*, under Equitable.
- Mortgages and Fixtures.** See *supra*, under Fixtures.
- "Most-Favoured-Nation" Clause in Commercial Treaties, Effect of.** *Sir Thomas Barclay.* 17 Yale L. J. 26.
- Movables, Taxation of, and the Fourteenth Amendment.** *John Bassett Moore.* Showing the tendency of the Supreme Court to disregard the rule *mobilia sequuntur personam*. 7 Colum. L. Rev. 309. See 20 HARV. L. REV. 138.
- Mueller Law Decision, The.** *Anon.* Adversely criticizing the Illinois decision that the issue of municipal bonds secured by a railway franchise increased the city's debt. 34 Nat. Corp. Rep. 325. See 21 HARV. L. REV. 149.
- Municipal Contracts for Street Paving when Patented or Monopolized Articles or Materials are Involved, as a Phase of the Case of the Will of the Law v. the Will of the Judge, Competitive Bidding in Letting.** See *supra*, under Bidding.
- Municipal Corporations, The Power of, to Make Special Assessments for Local Improvements.** *Edson B. Valentine.* 65 Cent. L. J. 38; 68 Alb. L. J. 325.
- Municipal Securities, The Better Protection of.** *Anon.* Giving reports of two commissions recommending methods for further protection. 24 Bank. L. J. 785.
- National Bank Loans, Are Undivided Profits "Surplus" in Computing the Limit of?** *Anon.* Contending that they are. 24 Bank. L. J. 347.
- Negligence, Agreed Valuation as Affecting the Liability of Common Carriers for.** See *supra*, under Agreed Valuation.
- Negligence, Contributory.** See *supra*, under Contributory.
- Negligence, Contributory, of the Beneficiary as a Bar to an Administrator's Action for Death.** See *supra*, under Administrator's.
- Negligence, Imputed Contributory, as Applied to Persons *sui juris*, The Doctrine of.** See *supra*, under Contributory.
- Negotiable Instruments Act, The New.** *Julian W. Mack.* Pointing out the most recent changes in the Illinois Negotiable Instruments Law. 2 Ill. L. Rev. 265.
- Negotiable Instruments Act, The New Illinois.** See *supra*, under Illinois.
- Negotiable Instruments Law, Effect of, on Liability of the Surety.** *T. A. S.* Adversely criticizing a holding that under the act an accommodation maker signing as surety is not released by an extension to the principal. 11 L. N. (Northport) 105.
- Neutral Powers and Persons in Land Warfare, Hague Convention concerning the Rights and Duties of.** See *supra*, under Hague Convention.
- New York, Admission to the Bar in.** See *supra*, under Bar.
- Note, Corporation Promissory, What is a?** See *supra*, under Corporation.
- Notice of Dishonor by Mail to Indorser in Same Place when Day Following Dishonor is Saturday.** See *supra*, under Dishonor.
- Obscenity Postal Laws, The Constitution and.** See *supra*, under Constitution.
- Office, *De Facto*.** See *supra*, under *De Facto*.

- Oil Trust and Government, The. *Francis Walker*. Abstracts of the reports of the Bureau of Corporations. 23 Pol. Sci. Quar. 18.
- Options to Purchase, Legal Validity, as Contracts, of, not Limited to the Period Allowed by the Rule against Perpetuities. *T. Cyprian Williams*. 51 Sol. J. 648, 669. See 20 HARV. L. REV. 240.
- Ownership, Possession and. II. *Albert S. Thayer*. Discussing the fundamental nature of these rights. 23 L. Quar. Rev. 314. See 3 HARV. L. REV. 23, 313, 337; 18 *ibid.* 196.
- Parent and Child, Some Doubtful Points Incident to the Relation of. *John A. Ferguson*. 4 Comm. L. Rev. 57. See p. 66.
- Part Payment, The Effect of, as against Devisees of Real Estate. See *supra*, under Devisees.
- Partial Performance of Entire Contracts, Right of Recovery for. See *supra*, under Contracts.
- Partnership, The Separate Estates of Non-Bankrupt Partners in the Bankruptcy of, under the Bankrupt Act of 1898. See *supra*, under Bankrupt Act.
- Patent Appeals, The Proposed Court of. *Otto Raymond Barnett*. 6 Mich. L. Rev. 441.
- Patent Law. *Edmund Wetmore*. Advocating the creation of a patent court of appeal. 17 Yale L. J. 101.
- Patented, Competitive Bidding in Letting Municipal Contracts for Street Paving when, or Monopolized Articles or Materials are Involved, as a Phase of the Case of the Will of the Law *v.* the Will of the Judge. See *supra*, under Bidding.
- Patents, Should "Paper Patents" be Accorded Favorable Consideration? *Walker Banning*. Reviewing the authorities on the point. 40 Chi. Leg. N. 22. See 20 HARV. L. REV. 638.
- Patents, The Protection of Unused. *Paul Bakewell*. Maintaining that equity should give protection. 19 Green Bag 406. See 20 HARV. L. REV. 638.
- Peace Conference of 1907, Central American. See *supra*, under Central.
- Peace Conference, The Second. *A. H. Charteris*. Discussing, among other results of the Conference, the proposed international prize court. 19 Jurid. Rev. 223, 347.
- Percolating Water, Some Observations on the Rights of Landowners in Subterranean. *Sumner Kenner*. Digesting the cases. 66 Cent. L. J. 194.
- Permissive Waste by Tenants for Life or Years. *Geo. S. Holmestead*. Collecting the English and Canadian cases. 44 Can. L. J. 175.
- Perpetuities, The Legal Validity, as Contracts, of Options to Purchase not Limited to the Period Allowed by the Rule against. See *supra*, under Options.
- Perpetuities, The Rule against. *Anon.* Summarizing the principal applications of the rule and collecting the Pennsylvania authorities. 12 The Forum 131.
- Police Power, Its Importance and Development. *Philo Hall*. 15 L. Stud. Helper 360.
- Police Power, What is the? *Walter Wheeler Cook*. 7 Colum. L. Rev. 322.
- Popular Government, Growth of American Theories of. *Albert Bushnell Hart*. Tracing the development through various stages to the present supremacy of the decisions of the courts. 1 Am. Pol. Sci. Rev. 531.
- Possession and Ownership. II. See *supra*, under Ownership.
- Possession, Title by Adverse. See *supra*, under Adverse.
- Possessory Rights, Title by Devolution of. *Anon.* 17 Madras L. J. 297. See p. 375.
- Powers of Appointment, Gifts of Liferent under. See *supra*, under Liferent.
- Powers of Sale as Affecting Restraints on Alienation. See *supra*, under Alienation.
- President's Annual Address. *Alton B. Parker*. Discussing the present trend of legislation to correct the abuses of corporate power and entering a plea for upholding the Constitution. 19 Green Bag 581.
- Private Property upon the High Seas, Would Immunity from Capture during War of Non-Offending, be in the Interest of Civilization? See *supra*, under Capture.
- Privilege, Qualified, Fair Comment and. See *supra*, under Comment.
- Prize Court, An International. See *supra*, under International.
- Process, Service of, Waiver of Exemption from, by Reason of Attendance upon Court by Non-Resident Party or Witness. *Anon.* Enumerating the methods by which waiver may be made. 35 Nat. Corp. Rep. 304.
- Process upon Corporations, Constitutionality of Statutes Authorizing Subservice of. See *supra*, under Constitutionality.
- Public Employment, Business Policies Inconsistent with. See *supra*, under Business Policies.
- Public Purposes for which Taxation is Justifiable. *Frederick N. Judson*. Showing the development and modern extension of the idea of what constitutes a public purpose. 17 Yale L. J. 162. See 21 HARV. L. REV. 276.
- Publicum Bonum Private Est Preferendum*. *Franklin A. Beecher*. Contending that

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- Purchaser, Vendor and. *Anon.* Maintaining that the vendor cannot sue before transfer is due for failure to pay advance instalments of the price. 27 Can. L. T. 725.
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- Railroad Valuation. *William Z. Ripley.* Discussing the methods of valuation in the light of modern legislation. 22 Pol. Sci. Quar. 577.
- Railroads, Illegality of the Action of the Circuit Court of the United States in Enjoining the Virginia State Corporation Commission from Enforcing a Two Cent Rate Affecting the Intra-State Business of. See *supra*, under Circuit Court.
- Railway Commissioners for Canada, The Work and Powers of the Board of. See *supra*, under Board.
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- Railway Rates, The Application of Judicial Remedies in the Regulation of, by Public Authority. See *supra*, under Judicial Remedies.
- Railway Valuation, Is it a Panacea? *Jackson E. Reynolds.* Contending among other things that intrastate rates of an interstate railway should be under federal control. 8 Colum. L. Rev. 265.
- Rate Bill, The Constitutional Aspect of the Senatorial Debate upon the. See *supra*, under Constitutional.
- Rate Regulation, Reasonableness of Maximum Rates as a Constitutional Limitation upon. See *supra*, under Constitutional.
- Real Estate, The Effect of Part Payment as against Devisees of. See *supra*, under Devisees.
- Real Estate, The Effect of Presumption of Death upon Marketability of Title to Real Estate. See *supra*, under Death.
- Reasonableness of Maximum Rates as a Constitutional Limitation upon Rate Regulation. See *supra*, under Constitutional.
- Recording Deeds in America, The Origin of the System of. See *supra*, under Deeds.
- Referendum, Is a Provision for the Initiative and, Inconsistent with the Constitution of the United States? See *supra*, under Constitution.
- Remaindermen, Rights of Life Tenants and, to Distributions of Stock and Corporate Assets made by Corporations to their Stockholders. See *supra*, under Corporations.
- Remainders, Professor Kales and Common Law. See *supra*, under Common Law.
- Remainders, Vested and Contingent. See *supra*, under Contingent.
- Representative Government, The Future of. *F. N. Judson.* Maintaining that faults in representative government cannot be cured by increasing the number of elective offices. 2 Am. Pol. Sci. Rev. 185.
- Roman Law and Mohammedan Jurisprudence. I, II, III. See *supra*, under Mohammedan.
- Rome and Law. *A. H. F. Lefroy.* 20 HARV. L. REV. 606.
- Sales, The Law of, in the United States. *Richard Brown.* Commenting from a Scottish point of view on Professor Williston's draft for a uniform sales act. 8 Colum. L. Rev. 82.
- San Francisco School Board Resolution, The Real Question under the Japanese Treaty and the. See *supra*, under Japanese Treaty.
- Separation Agreements. *Anon.* Discussing a late English case allowing a wife to sue for restitution despite a separation agreement. 26 L. N. (London) 209.
- Servants, Allowance of Special Damages in Actions for Wrongful Dismissal of. See *supra*, under Damages.
- Service of Process by Reason of Attendance upon Court by Non-Resident Party or Witness, Waiver of Exemption from. See *supra*, under Process.
- Shareholder's, Bank, Right of Inspection. See *supra*, under Bank.
- Sovereignty in a State, Notes on. Second Paper. *Robert Lansing.* Discussing the relation of state sovereignty to civil and state liberty, to constitutions, and to law. 1 Am. J. of Int. L. 297.
- Special Assessments for Local Improvements, The Power of Municipal Corporations to Make. See *supra*, under Municipal Corporations.
- State Constitutional Domains, Federal and. See *supra*, under Constitutional.
- State Land by the Federal Authorities, The Acquisition of. See *supra*, under Federal.
- State, Notes on Sovereignty in a. Second Paper. See *supra*, under Sovereignty.
- States, Suability of, by Individuals in the Courts of the United States. *Jacob Trichter*

- Discussing how far state officers are suable. 41 Am. L. Rev. 845. See 20 HARV. L. REV. 245; 21 *ibid.* 527.
- Stock, Watered, at Common Law. *Wm. C. White*. Contending that stockholders who have received paid up stock without full payment should be made liable only by legislation. 5 The Law 81, 103.
- Stockholder, Right of a, Suing in Behalf of a Corporation, to Complain of Misdeeds Occurring Prior to his Acquisition of Stock. See *supra*, under Corporation.
- Stocks, on Margin, Recovery in New York of Interest in Excess of Six Per Cent Paid by Brokers on Money Borrowed to Purchase and Carry. See *supra*, under Brokers.
- Strikes, Boycotts, and Similar Unlawful Acts, Injunctions against. See *supra*, under Boycotts.
- Support, The Right of Surface (Continued). *Joseph P. McKeahan*. Discussing a recent modification in Pennsylvania. 11 Dickinson Forum 147.
- Supreme Court, The Newest Neologism of the. *William Trickett*. Maintaining that the Supreme Court was wrong in saying in *Kansas v. Colorado* that the federal judiciary has more than enumerated powers. 41 Am. L. Rev. 729. See 21 HARV. L. REV. 47.
- Supreme Court, The Power of the, to Enforce its Decrees. *George C. Lay*. Historical survey of the cases in which a state has refused to obey the Supreme Court decrees, and discussion of the possibility of enforcing such decrees today. 41 Am. L. Rev. 515.
- Surety, Effect of Negotiable Instruments Law on Liability of the. See *supra*, under Negotiable Instruments.
- Surface Water in cities, the Rights and Remedies on Permitting, Diverting, Increasing and Obstructing the Natural Flow. *John R. Rood*. 6 Mich. L. Rev. 448.
- Surplus, Distribution of, by Insurance Companies. See *supra*, under Insurance Companies.
- Surrender Clause, Effect of, in Oil Lease. *Berkeley Minor, Jr.* Discussing the various theories. 14 The Bar 26.
- Taxation of Bank Capital, Exemption of United States Securities from the. See *supra*, under Bank Capital.
- Taxation of Movables and the Fourteenth Amendment. See *supra*, under Movables.
- Taxation, Public Purposes for which, is justifiable. See *supra*, under Public Purposes.
- "Taxes," May Congress Levy Money Exactions, Designated, Solely for the Purpose of Destruction? *John Barker Waite*. 6 Mich. L. Rev. 277. See p. 455.
- Tenants for Life or Years, Permissive Waste by. See *supra*, under Permissive Waste.
- Title by Adverse Possession. See *supra*, under Adverse Possession.
- Title by Devolution of Possessory Rights. See *supra*, under Possessory Rights.
- Title to Real Estate, The Effect of Presumption of Death upon Marketability of. See *supra*, under Death.
- Tool Case of Colorado, The—Right of Appellate Tribunal to Assume Charge of Elections by Writ of Injunction. See *supra*, under Appellate.
- Tort Liability, The Moral Duty to Aid Others as a Basis of. See *supra*, under Moral Duty.
- Trade Mark Cases, A Phase of Accounting in. *Guy Cunningham and Joseph Warren*. 20 HARV. L. REV. 620.
- Trade Unions and Trusts, Attitude of the State towards. *Henry R. Seager*. Contending for uniformity in treatment. 22 Pol. Sci. Quar. 385.
- Trade Unions, The Legal Status of, in the United Kingdom, with Conclusions Applicable to the United States. *Henry R. Seager*. Discussing both on authority and on principle the right to sue an unincorporated union. 22 Pol. Sci. Quar. 611.
- Treaties, Effect of "Most-Favoured-Nation" Clause in Commercial. See *supra*, under "Most-Favoured-Nation" Clause.
- Treaties, Federal, and State Laws. *Charles Noble Gregory*. A general discussion. 6 Mich. L. Rev. 25.
- Treaty-Making Power, The. *L. Atherley-Jones*. Contending that in England today the power to make treaties of alliance should not be so exclusively in the Cabinet. 42 L. J. 511.
- Treaty-Making Power, The Extent and Limitations of the, under the Constitution. See *supra*, under Constitution.
- Treaty-Making Power, The Japanese School Question and the. See *supra*, under Japanese School.
- Trial, The Evolution of the Right of. *Horace H. Lurton*. 52 Oh. L. Bul. 442.
- Trust Funds to Legacies, Appropriation of. See *supra*, under Legacies.
- Trusts, Attitude of the State towards Trade Unions and. See *supra*, under Trade Unions.

- Trusts, Constructive, Based upon the Breach of an Express Oral Trust of Land. See *supra*, under Constructive.
- Trusts, The Origin of Uses and. *James Barr Ames*. 21 HARV. L. REV. 261.
- Turnpikes, Damages in the Publicization of. See *supra*, under Damages.
- "Turntable" Cases, Should the Doctrine of the, Holding Railroad Corporations Liable for Injuries to Trespassing Children, be Extended so as to Make Land-Owners Liable for Injuries Caused to Trespassing Children by Unguarded Ditches, Ponds, etc.? *Sumner Kenner*. 66 Cent. L. J. 137.
- Two Cent Rate, Illegality of the Action of the Circuit Court of the United States in Enjoining the Virginia State Corporation Commission from Enforcing a, Affecting the Intra-State Business of Railroads. See *supra*, under Circuit Court.
- Uniform State Laws, Commercial Aspect of. *Francis B. James*. 5 Mich. L. Rev. 509.
- Uniformity of Law in the Several States as an American Ideal. I. Case Law. *William Schofield*. 21 HARV. L. REV. 416.
- Union Labor, Discrimination against — Legal? *Richard Olney*. Contending that the Adair case was wrong in holding unconstitutional a statute forbidding interstate railways from discharging men because of membership in a union. 42 Am. L. Rev. 161. See 21 HARV. L. REV. 370.
- Union Pacific Railroad Company, The Government's Suit against the. *Edson R. Sunderland*. Contending that the remedy for inefficient railway service lies not in prosecution under the Sherman Act, but in regulation. 6 Mich. L. Rev. 361.
- United States Courts, The Common Law Jurisdiction of the. See *supra*, under Common Law Jurisdiction.
- United States Securities, Exemption of, from the Taxation of Bank Capital. See *supra*, under Bank Capital.
- Uses and Trusts, The Origin of. See *supra*, under Trusts.
- Valuation, Agreed, as Affecting the Liability of Common Carriers for Negligence. See *supra*, under Common Carriers.
- Valuation, Railway, Is it a Panacea? See *supra*, under Railway.
- Variance on Appeal, Taking Advantage of. See *supra*, under Appeal.
- Vendor and Purchaser. See *supra*, under Purchaser.
- Verdicts, The Power of Appellate Courts to Cut Down Excessive. See *supra*, under Appellate Courts.
- Vessels, Confusion in the Law Relating to Materialmen's Liens on. See *supra*, under Liens.
- Vested and Contingent Future Interests in Illinois. See *supra*, under Contingent.
- Vested and Contingent Remainders. See *supra*, under Contingent.
- Voluntary Association, The Personal Liability of Members of. See *supra*, under Liability.
- War, Contraband of. See *supra*, under Contraband.
- War on Land, The Amelioration of the Rules of. *George D. Davis*. 2 Am. J. of Int. L. 63.
- Waste, Permissive, by Tenants for Life or Years. See *supra*, under Permissive Waste.
- Water, Some Observations on the Rights of Landowners in Subterranean Percolating. See *supra*, under Percolating.
- Water, Surface, in Cities, the Rights and Remedies on Permitting, Diverting, Increasing and Obstructing the Natural Flow. See *supra*, under Surface Water.
- Young v. Grote. *Thomas Beven*. Contending that the drawer of a check who negligently gives opportunity for raising it should be liable. 23 L. Quar. Rev. 399. See 20 HARV. L. REV. 139.

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NO. 1.

ENFORCEMENT OF A RIGHT OF ACTION ACQUIRED UNDER FOREIGN LAW FOR DEATH UPON THE HIGH SEAS.

I.

SHOULD a right of action acquired under foreign law for death upon the high seas be enforced by a court of admiralty of the United States?

The foregoing question came before the District Court of the United States for the Northern District of Illinois in the case of *Rundell v. La Compagnie Générale Transatlantique*; ¹ and before the Circuit Court of Appeals for the Seventh Circuit on an appeal taken by the libellant in the same case. ²

The controversy grew out of the loss of the French steamship *La Bourgogne* belonging to the defendant company, a French corporation. On July 4, 1898, *La Bourgogne* collided on the high seas with the British sailing vessel *Cromartyshire* and was sunk. Edwin R. Rundell, a citizen of Illinois and a passenger on *La Bourgogne*, was lost in the collision. The administrator of Rundell filed a libel *in personam* in the District Court against the French corporation owning *La Bourgogne*.

There being no right of action either at common law or by the general maritime law as understood and practiced in the United States for death caused by a wrongful or negligent act, ³ the libel-

¹ 94 Fed. 366 (1899).

² 100 Fed. 655 (1900).

³ *Insurance Co. v. Brame*, 95 U. S. 754; *Dennick v. Central R. Co.*, 103 U. S. 11, 21; *The Harrisburg*, 119 U. S. 199; *The Alaska*, 130 U. S. 201; *Carey v. Berkshire R. Co.*, 1 Cush. (Mass.) 475; *Holland v. Lynn & Boston R. Co.*, 144 Mass. 425; *Seward v. Vera Cruz*, 10 App. Cas. 59.

lant alleged in his libel that certain sections of the statute law of France, which were set forth *in hæc verba*, gave a legal representative a right of action for the death of his intestate accruing through the negligence of another; and that by the decisions of some of the courts of France said statute law is held to extend to and operate upon all persons, whether citizens or aliens, upon the high seas, in vessels flying the French flag; and that under those statutes and decisions a right of action for the death of said deceased, enforceable in the District Court, arose and existed in favor of the libellant. Exceptions to the libel were filed, which were sustained by the District Court, and the libel was dismissed. The decree of the District Court was affirmed in the Court of Appeals.

It is not altogether clear upon the allegations of the libel what the character of the French law was under which the libellant claimed to have acquired his right of action. His claim, by reason of the territoriality of La Bourgogne, might be based on the strictly local or territorial law of France; or he may have based his right upon the jurisdiction which France exercises, or may, if she chooses, exercise, over her own citizens, wherever they may be; or it may be that the libel was intended to set forth a right of action under the general maritime law of France.

As the case went off, however, it is not material to determine the proper construction of the libel in this particular.

The second exception asserted that "no right of action exists and no action can be maintained in a court of admiralty of the United States to recover damages for death by negligence occurring upon the high seas."

The third exception advances the proposition that "the general maritime law as interpreted and enforced by the courts of the United States" alone governs the case.

It is obvious that these exceptions could not be sustained and the libel dismissed unless it could be said, as a matter of law, however the libel might be construed, that the right of action could not be enforced in a court of admiralty of the United States.

Accordingly, neither the District Court nor the Circuit Court of Appeals undertook to construe the libel. The District Court simply assumed that it set out a right of action under the general maritime law of France, and held that such a right could not under the circumstances be enforced in an American court of admiralty.

The Court of Appeals considered each possible aspect of the

case. It took up first the question as to what would be the rights of the libellant if they depended on the strictly local or territorial law of France. In such case, of course, it would, as the court correctly declared, be necessary for the libellant to show that the cause of action arose within the French territorial jurisdiction. The libellant contended that the cause of action must be taken to have arisen within French territorial jurisdiction and to have been governed by the French territorial law, since the ship must be regarded as a floating portion of the territory of France.

Assuming this to be true, in the case before the court the gist of the action was, on elementary principles, the death, and the cause of action arose where the death took place. This being so, it would not seem an extreme step to take to hold that, if the negligent act caused the loss of the ship and death by drowning, the French territorial law should still govern, although, as was the case here, it were impossible to show whether the deceased were drowned in his bunk, or went down with the ship, or leaped into the sea and came to his end a few yards away. The court, however, declined to take this view. Bunn, J., after showing that the cause of action arose where the death took place, said: ¹

“To make the local law of France, therefore, of any possible application, it should appear by clear averment that the drowning took place upon the steamship. The libel nowhere states that the deceased came to his death while upon the *Bourgogne*. The averments are merely that he lost his life by drowning as a result of a collision and sinking of the vessel. The plain implication, therefore, is that he was drowned upon the high seas, apart from the vessel. At least, there is nothing to show the contrary. The locus of the tort, therefore . . . must be considered as being upon the high seas rather than upon French territory.”

This line of argument would seem to be fairly open to the charge of excessive refinement; and the contrary was taken for granted in *Regina v. Keyn*.²

The court, however, did not base its decision on this ground. It held, not that the libel properly construed showed only a right given by French territorial law and therefore not enforceable for the reasons above quoted, but that if the libel was to be so construed there could be no recovery, and then proceeded to consider what would be the result if the libel correctly interpreted showed that the right given by the French law rested on some other basis, as,

¹ P. 656.

² 2 Ex. D. 63, 235

for instance, the undoubted right of France to make laws which would bind its own citizens abroad, if they should ever return to be adjudged in the courts of their own country.¹

By virtue of this power over its own citizens abroad, France had the right and authority to impose upon them the liability to pay damages for death caused by their wrongful or negligent acts on the high seas, to confer a right to recover those damages on the personal representative of the deceased, and to make that right enforceable in the French courts. Unquestionably, if the French statutes and decisions referred to in the libel rested on this principle, they conferred a right upon the libellant which he could have enforced, if the suit had been brought in France. Should an admiralty court of the United States enforce that right? The Circuit Court of Appeals said that the right of a nation to control its citizens abroad was not a right that would always be respected by the courts of other countries, and held that the libellant could not recover on this principle.

A very interesting question is here presented, and one on which there is little, if any, direct authority. Suppose the transaction had taken place within the territorial waters of a state of the United States where there was no action for death. As will be shown later, by the great weight of authority in the United States, a right of action duly acquired under foreign law will be enforced, though the transaction giving rise to the right would not give rise to a similar right in the country of the forum.

The fact, therefore, that there is no action by the law of the forum ought not to be of any more consequence than where the transaction giving rise to the right of action occurs on foreign territory. Of course, if the act for which the foreign law imposed a liability on its citizens were one which the law of the forum directly authorized or sanctioned, its courts could hardly be expected to hold that any one, even a foreigner, would be under any liability for doing what the law of the place where the act was done authorized and empowered him to do.

But the law of no state in the United States authorizes or empowers any one, citizen or foreigner, wrongfully to cause death. In fact in this case, if the libellant's intestate had escaped with injuries, the defendant would have been liable in damages. It would seem, in the case supposed, that an American court should not

¹ Story, *Conf. of Laws*, 8 ed., §§ 21, 22; *The Zillverein*, Swab. 96, 98; *Reg. v. Kern*, 2 Ex. D. 61.

refuse, at any rate in favor of its own citizens, to enforce a right which would by that enforcement become a valuable right, which the law of France by virtue of its powers over its own citizens was competent to create, and which was not in conflict with the policy of, or any right created by, the law of the state of the forum, merely for the sake of preventing the French law from affecting, even indirectly, transactions occurring within the United States.

If this is sound, all the more should such a right be enforced where the transaction takes place on the high seas, where France has jurisdiction as fully as the United States.¹

¹ The *Scotland*, 105 U. S. 24; *U. S. v. Rodgers*, 150 U. S. 249, 272; The *Brantford City*, 29 Fed. 373, 383. The point was taken in *The Mary Moxham*, L. R. 1 P. D. 107. An English ship negligently injured a pier in a port in Spain. By the law of England the owners of the vessel would be liable for the negligence of the master and crew, if the negligent acts occurred in England. Under the law of Spain, there was no such liability on the part of the owners. The court gave judgment for the defendants.

If the defendants were liable at all, it was because the acts of the master and crew, on familiar principles of agency, were the acts of the owners. Those acts took place in Spain, and the cause of action arose there. If it be assumed that England, by virtue of her jurisdiction over her citizens wherever they might be, could and did give a right of action enforceable in the English courts for an act done in Spain, then it might be urged that the Spanish courts could and would enforce that right of action. Such being the case, the plaintiff should have had judgment. This, if the argument is understood, is precisely the position taken by Benjamin, counsel for plaintiff. The court, apparently not stopping to consider whether on the basis suggested an action would lie under the English law, if the Spanish law presented no difficulties, met him with the proposition that an action would not lie in England for a wrongful act committed abroad, unless the act were wrongful by the law of the place where it was committed as well as by the law of England, and that the act was not wrongful by the law of Spain. If the court meant by this that it must appear that an action would lie in both jurisdictions, it might perhaps be answered that according to the argument the English acquired right would be enforced in Spain and so the requirement be fulfilled. If the court meant that it must appear that an action would lie under the English law and under the Spanish law irrespective of that branch of it which dealt with the enforcement of foreign acquired rights, then the proposition announced by the court would, if sound, prevent recovery in England. As a matter of fact, however, both court and counsel considered the question as limited by the precise terms used, and Benjamin proceeded to argue that the act was wrongful under Spanish law because admittedly an action lay in Spain against the master and crew.

To this the court answered that the question as to who, if any one, was liable for a given act was in no sense a question of remedy or procedure, but one of substantive law. The decision was right, but the true reason for it was not clearly brought out. In fact counsel and court were somewhat at cross-purposes. Benjamin was apparently seeking the enforcement of a right given by the English law by virtue of its jurisdiction over British subjects everywhere. The court seemed to have assumed that the right sought to be enforced was acquired, if at all, under the laws of Spain. A sufficient answer to Benjamin's argument would have been that the law-making power of England, while undoubtedly possessing power to create rights of action against Englishmen for torts committed abroad, had not chosen to exercise that power. Setting

It is open, however, to the courts of any country, where the matter has not been decided to the contrary, to hold that a right acquired under the law of a foreign nation and based solely on its jurisdiction over its own citizens abroad will not be enforced where the question arises in respect of a transaction taking place outside the jurisdiction of that nation. The decision, therefore, of the Court of Appeals in the present case is not, perhaps, so far as this question is concerned open to serious criticism on strict legal grounds, whatever may be thought of the wisdom of such a rule on considerations of policy.

Having decided that there could be no recovery by the libellant if he based his right either on the French local law or on the jurisdiction of the French government over its own citizens everywhere, the court came finally to the question as to what the result would be if the libellant were given a right of action by the general maritime law of France, and held that such a right could not be enforced by an admiralty court of the United States.

It is the object of this article to question the accuracy of this decision, and to show that, where a right of action for death upon the high seas is given by the general maritime law of a foreign state, it should certainly be enforced, under proper conditions, by admiralty courts of the United States in favor of citizens of the United States, and should on principle also be enforced even as against citizens of the United States.

The doctrine upon which the enforcement of such rights rests is the familiar one set forth in *Dennick v. Central R. Co.*,¹ in which case Mr. Justice Miller, delivering the opinion of the court, said :

that consideration aside, the court could properly have said that the English courts would not in any event enforce such a right where it conflicted with an equally valid right created by a foreign country acting within its strict territorial jurisdiction. The Spanish law had a right to provide and did provide that no employer should be liable for the negligent acts of his servants committed on Spanish territory. This immunity conferred on the defendant by the Spanish law was a right of as high a character as the right acquired by the plaintiffs under the English law, and as the transaction occurred on Spanish territory the defendant properly prevailed. The significant part of the case so far as this discussion is concerned, is that counsel of Benjamin's eminence should advance the proposition that the Spanish courts would enforce rights acquired under English law by virtue of England's jurisdiction over her own subjects in respect of a transaction occurring on Spanish territory, if the act were wrongful by Spanish law. Had the act, in truth, been wrongful by Spanish law, although not actionable, irrespective of considerations of comity, and no right of immunity had been conferred on the defendant, the situation would have been on all fours with the case under discussion and Benjamin's position would have been sound.

¹ 103 U. S. 11.

"It is, indeed, a right dependent solely on the statute of the state; but when the act is done for which the law says the person shall be liable, and the action by which the remedy is to be enforced is a personal and not a real action, and is of that character which the law recognizes as transitory and not local, we cannot see why the defendant may not be held liable in any court to whose jurisdiction he can be subjected by personal process or by voluntary appearance, as was the case here. It is difficult to understand how the nature of the remedy, or the jurisdiction of the courts to enforce it, is in any manner dependent on the question whether it is a statutory right or a common law right. Wherever, by either the common law or the statute law of a state, a right of action has become fixed and a legal liability incurred, that liability may be enforced and the right of action pursued in any court which has jurisdiction of such matters and can obtain jurisdiction of the parties."

In *Hilton v. Guyot*¹ Chief Justice Fuller in his dissenting opinion,² concurred in by Justices Harlan, Brewer, and Jackson, said:³

"The rule is universal in this country that private rights acquired under the laws of foreign states will be respected and enforced in our courts unless contrary to the policy or prejudicial to the interests of the state where this is sought to be done; and although the source of this rule may have been the comity characterizing the intercourse between nations, it prevails today by its own strength, and the right to the application of the law to which the particular transaction is subject is a juridical right."

The contention has been made that a right of action arising under foreign law should not be enforced if there would be none by the law of the forum in case the transaction giving rise to the right took place within the jurisdiction of the forum. In the federal courts of the United States at least, such is not the law, and a long line of federal decisions, to only a few of which it is necessary to refer, has firmly established for those courts the general doctrine of enforcing rights accruing under foreign law, whether the law of the forum gives a similar right or not.⁴

¹ 159 U. S. 113.

² While these remarks were made in a dissenting opinion, the dissent proceeded on a distinct ground, and there is nothing to indicate that on this point all the judges were not in accord.

³ P. 233.

⁴ *Texas & Pac. R. Co. v. Cox*, 145 U. S. 593; *Huntington v. Attrill*, 146 U. S. 657; *Northern Pac. R. Co. v. Babcock*, 154 U. S. 190; *Stewart v. B. & O. R. Co.*, 168 U. S. 445; *Barrow S. S. Co. v. Kane*, 170 U. S. 100; *Nonce v. R. & D. R. Co.*, 33 Fed. 429; *McCarty v. N. Y., etc., R. Co.*, 62 Fed. 437; *Theroux v. Northern Pac. R. Co.*, 64 Fed. 84; *Bigelow v. Nickerson*, 70 Fed. 113; *Boston & M. R. Co. v. McDuffey*, 79 Fed. 934;

The same rule is followed in the admiralty courts of the United States, which have repeatedly enforced rights accruing under the laws of the different states and of foreign countries where the subject matter of the controversy has been maritime in its nature.¹

It is not, of course, every right acquired under foreign law that will be enforced. It must first appear that certain requirements prescribed by established principles as to the origin and character of the right are fulfilled.

The court of the forum must have jurisdiction over the *res* if the right is *jus in re* and over the person of the defendant if the right is *in personam*.

The cause of action must be transitory in its nature.

The court must have jurisdiction of the subject matter of the controversy.

The right must have been duly acquired; in other words, the law under which it arose must have been competent, upon recognized legal principles, to create it.

The enforcement of the right must appear to be not contrary to the established public policy of the country of the forum.

Finally, if the cause of action arose in a locality subject to two or more jurisdictions, it should appear that a right arising under the laws of one of such jurisdictions does not conflict with rights of equal value created by the law of another.

No question was, or could be made that the District Court in the present case had jurisdiction over the person of the defendant, or that the action was transitory in its nature. It is equally clear that the District Court and the Circuit Court of Appeals, being admiralty courts of the United States, had jurisdiction of the cause of action in consequence of its maritime nature as a tort upon the high seas.²

Davidow v. Pa. R. Co., 85 Fed. 943; Law v. Western Ry., 91 Fed. 817; Van Doren v. Pa. R. Co., 93 Fed. 260; Erickson v. Pacific Coast S. S. Co., 96 Fed. 80.

¹ *Ex parte* McNiel, 13 Wall. (U. S.) 236; Steamboat Company v. Chace, 16 *ibid.* 522; The Lottawanna, 21 *ibid.* 558; The Corsair, 145 U. S. 335; The Glide, 167 U. S. 606; Holmes v. O. & C. Ry Co., 5 Fed. 75; *In re* Long Island, etc., Transportation Co., 5 Fed. 599, 608; Garland, 5 Fed. 924; The E. B. Ward, Jr., 16 Fed. 255; s. c. 17 Fed. 456; The Cephalonia, 29 Fed. 332; The James Berwind, 44 Fed. 693; s. c. 49 Fed. 956; The Oregon, 45 Fed. 62; The St. Nicholas, 49 Fed. 671; The H. E. Willard, 52 Fed. 387; The City of Norwalk, 55 Fed. 98; Bigelow v. Nickerson, 70 Fed. 113; Robinson v. Detroit, etc., Navigation Co., 73 Fed. 883; The Jane Grey, 95 Fed. 693; The Onoko, 107 Fed. 984, 986.

² Gordon, Petitioner, 104 U. S. 515; The A. W. Thompson, 39 Fed. 115; The City of Norwalk, 55 Fed. 98, 108; Stern v. La Compagnie Générale Transatlantique, 110 Fed. 996, 998.

A more serious question is whether the general maritime law of France was competent to confer on the libellant the right of action he sought to enforce.

The proposition here involved is thus stated by Mr. Dicey:¹

"Any right which has been duly acquired under the law of any civilized country is recognized and, in general, enforced by English courts, and no right which has not been duly acquired is enforced or, in general, recognized by English courts."

After explaining the meaning of the words "right" and "acquired" as used by him, the learned author sets forth the significance of the term "duly"; he says:²

"The mere possession of a right by A under the law of a foreign country, *e. g.*, Italy, is not of itself the foundation for its enforcement, or even of its recognition, by English tribunals. The foundation is its due acquisition under the law of Italy. . . . What, then, is the test of due acquisition? . . . The right conferred by the Italian sovereign and acquired by A may lack due acquisition because the right is one which, in the opinion of the English courts, the King of Italy, acting either as legislator or judge, has conferred without possessing proper authority to confer it. The Italian sovereign has in the supposed case acted, in the opinion of English courts, *ultra vires*. . . . A sovereign's authority, in the eyes of other sovereigns and the courts that represent them, is, speaking very generally, coincident with, and limited by, his power."

In determining whether the law of a foreign state is, according to this rule, competent to create a given right, no question can arise as to the duty of the courts of that state to enforce any right given by the law thereof. If the law of France gives a right of action even as against foreigners for death upon the high seas, it is the duty of the French courts to enforce that right.³

Neither will any question necessarily arise so long as the right is enforced in respect of transactions occurring within the territorial jurisdiction of the country in question, or, if outside thereof, against its own citizens only.

The question of due acquisition is most frequently and most sharply raised when the foreign acquired right is sought to be enforced against a citizen of the country of the forum. It is clear

¹ Dicey, *Conf. of Laws*, 22.

² P. 26.

³ *Reg. v. Keyn*, 2 Ex. D. 63, 160, 220; *Seward v. Vera Cruz*, 10 App. Cas. 59 (*per* Lord Blackburn).

that such a right must be regarded as duly acquired, that, in other words, the law under which the right arises must be held competent to create it, if a judgment enforcing such right in the country in which it arises will be treated as valid by the courts of other nations, especially the nation against a citizen of which the judgment is given.

So here the French maritime law was competent to create the right set forth in the libel, if, on established legal principles, the courts of other nations, particularly the United States, would recognize as valid the decree of a French court enforcing such a right against an American citizen.

It should not be lost sight of, in a discussion of this question, that reference is had to strict legal rights, and that when it is said that a right acquired under foreign law will or will not be enforced, the term law is to be understood in the sense of the express command of the law-making power of a sovereign state. As was said by Judge Grosscup for the Circuit Court of the United States for the Northern District of Illinois:¹

"In the sense under review, it is a rule of civil conduct prescribed by the supreme power in the state. Mere definitions of right and wrong are not necessarily law. They may be so manifestly just that they ought to control civil conduct, but the citizen is under no legal obligation to obey them unless they are the express command of the supreme power in the state. A rule of civil conduct, to have the force of law, must emanate from some power that is supreme in the field to which the rule belongs. When we would know what the law is, therefore, we must inquire always from what power it proceeds, and the right of that power to prescribe it."

In this sense there is no such thing as a general maritime law apart from the law of any particular state. The general maritime law as understood and administered in any state is a part of the law thereof. It is a rule of conduct prescribed by the supreme power in that state.

Mr. Justice Bradley, delivering the opinion of the court in the *Lottawanna*,² said:

"But it is hardly necessary to argue that the maritime law is only so far operative as law in any country as it is adopted by the laws and usages of that country. In this respect it is like international law or the laws of war,

¹ *Swift v. Phila., etc., R. Co.*, 64 Fed. 59, 61. See also *Reg. v. Keyn*, 2 Ex. D. 63, 151.

² 21 Wall. (U. S.) 558, 572.

which have the effect of law in no country any further than they are accepted and received as such ; or, like the case of the civil law, which forms the basis of most European laws, but which has the force of law in each state only so far as it is adopted therein, and with such modifications as are deemed expedient. The adoption of the common law by the several states of this Union also presents an analogous case. It is the basis of all the state laws ; but it is modified as each sees fit. Perhaps the maritime law is more uniformly followed by commercial nations than the civil and common laws are by those who use them. But, like those laws, however fixed, definite, and beneficial the theoretical code of maritime law may be, it can have only so far the effect of law in any country as it is permitted to have."

And again, —

"Each state adopts the maritime law, not as a code having any independent or inherent force, *proprio vigore*, but as its own law, with such modifications and qualifications as it sees fit. Thus adopted and thus qualified in each case, it becomes the maritime law of the particular nation that adopts it."¹

In *The Manhasset*² Judge Hughes, speaking of the maritime law, said :³

"It is not to be supposed, however, that this law has any force in any particular jurisdiction contrary to the will of that sovereign power. Only so far as it is adopted by the legislation and enforced by the judicial tribunals of each sovereignty, has it force in each jurisdiction."

In *Lloyd v. Guibert*⁴ Mr. Justice Willes, in dealing with the plaintiff's contention that the case should be governed by the general maritime law, said :⁵

¹ Mr. Justice Bradley repeated these declarations in *The Scotland*, 105 U. S. 24, saying: "But, whilst the rule adopted by Congress is the same as the rule of the general maritime law, its efficacy as a rule depends upon the statute, and not upon any inherent force of the maritime law. As explained in *The Lottawanna*, 21 Wall. 558, the maritime law is only so far operative as law in any country as it is adopted by the laws and usages of that country." See also *The Gaetano & Maria*, L. R. 7 P. D. 137, 143.

² 18 Fed. 918.

³ P. 921.

⁴ L. R. 1 Q. B. 115.

⁵ P. 123. See also *Chartered Mercantile Bank of India v. Netherlands, etc., Co.*, 10 Q. B. D. 521; *Liverpool & Great Western Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 444; *Butler v. Boston Steamship Co.*, 130 U. S. 527, 556; *In re Garnett*, 141 U. S. 1, 13; *Ralli v. Troop*, 157 U. S. 386, 407; *The John G. Stevens* 170 U. S. 113, 126, 127; *In re Long Island, etc., Transportation Co.*, 5 Fed. 599, 614; *The Katie*, 40 Fed. 480, 494; *Swift v. Phila. & R. R. Co.*, 64 Fed. 59, 68.

"We can understand this term in the sense of the general maritime law as administered in the English courts, that being in truth nothing more than English law, though dealt out in somewhat different measures in the Common Law and Chancery Courts, and in the peculiar jurisdiction of the Admiralty; but as to any other general maritime law by which we ought to adjudicate upon the rights of a subject of a country which, by the hypothesis, does not recognize its alleged rule, we were not informed what may be its authority, its limits, or its sanction. . . . It would be difficult to maintain that there is, as to such questions as the present, depending in a great measure upon national policy and economy, any general in the sense of universal law binding at sea, any more than upon land, nations which either have not assented or have withdrawn their assent thereto."

It follows that, when an admiralty court of any nation entertains a suit relating to transactions occurring on the high seas, the right administered or enforced will be a right given by that branch of the law of the nation which deals with maritime matters. If, for instance, a libel is instituted in a British admiralty court to recover damages caused by a collision on the high seas between a British and an American vessel, and a recovery is had, it will be based on a right conferred on the libellant, not by any independent system of law called the general admiralty law, for there is no such thing, but by that part of the law of England that concerns itself with such matters.

The right which an admiralty court is called upon to enforce is not necessarily a right acquired under the law of the nation in which the court sits; it may arise under the law of some foreign state; but it is invariably true that the right enforced is created by the fiat of some state or nation. In any litigated case there always is or may be a question as to what the law governing the controversy is. In suits in admiralty courts where such a question arises, resort is properly had to the mass of ordinances, decisions, and treatises of all the civilized states to ascertain what the consensus of opinion is on the point under discussion as bearing on the real issue, that is, what the maritime law of the forum may be on the point. This mass of ordinances, decisions, and treatises is for convenience appropriately enough termed "the law of the sea," or the "general maritime law." But as a system creating legal rights and imposing legal duties there is no such thing as a general maritime law, except as it forms a part of the judicial code of a particular nation.

By what right, then, do the maritime states adjudicate upon con-

controversies arising out of transactions upon the high seas in which foreigners are involved? To put the question in another way, why is it that a decree of a British admiralty court casting an American ship in damages by reason of a collision on the high seas, which are not within British jurisdiction, will be recognized as valid in the United States? The answer to both questions is the same, and is that the various civilized states have agreed to allow each other to take full cognizance of controversies upon the high seas. It is not enough to say that as the court has jurisdiction over the *res* its decree *in rem* will be valid everywhere. The court must also, in cases where the cause of action depends upon the locality of the transaction, have jurisdiction over the place where the transaction occurred. If that place is the high seas, the courts of no nation can have jurisdiction, as against the citizens of other nations, in respect to transactions occurring thereon, except by consent. The foundation, therefore, of the admiralty jurisdiction is the common consent of the different maritime states.

"As maritime commerce came to be extended, and international commerce and intercourse became more frequent, the sea was considered the common highway of nations, where, for the purposes of business, all nations must be equal in right, and the common convenience, as well as the common right, rendered necessary and ultimately established general rules, as the Law of the Sea, to which all submitted as to a sort of maritime law of nations, and the courts of each nation enforced it."¹

As said by Mr. Justice Strong, delivering the opinion of the court in *The Scotia*,²

"Undoubtedly, no single nation can change the law of the sea. That law is of universal obligation, and no statute of one or two nations can create obligations for the world. Like all the laws of nations, it rests upon the common consent of civilized communities. It is in force, not because it was prescribed by any superior power, but because it has been generally accepted as a rule of conduct. Whatever may have been its origin, whether in the usages of navigation or in the ordinances of maritime states, or in both, it has become the law of the sea only by the concurrent sanction of those nations who may be said to constitute the commercial world."

¹ Benedict, Adm. Pr., 3 ed., 2.

² 14 Wall. (U. S.) 170, 187. This language was quoted with approval in *The Paquete Habana*, 175 U. S. 677, 711. See also *In re Long Island*, etc., Transportation Co., 5 Fed. 599, 622.

In *Thomassen v. Whitwell*¹ it was said by Judge Benedict:

"There is also a general maritime law in force on the sea which is part of the law of nations, and consists of certain rules applicable to affairs of the sea, which have been so often acted upon, and by so many different nations, that they are deemed to have been assented to by all, and according to which all persons going on the sea may justly be supposed to have agreed to be judged in respect to acts there done. This law courts of admiralty by the comity of nations are in a proper case authorized to administer."

In *The Manhasset*² Judge Hughes said:³

"The maritime law . . . is a system of usages and principles which has been adopted by the general consent of commercial nations. It is not to be found in any distinct code or body of legislation, but is so thoroughly exemplified in treatises and recorded adjudications as to have lost the character of an unwritten law. It has its authority and sanction in the consent of all nations, whose courts enforce its principles. After its claim to be founded on principles of natural justice, its highest value consists in its world-wide uniformity and acceptance."

The significance of this common agreement is that while, as a general proposition, it is true that the law of no state can have any efficacy beyond the territories thereof, and that the high seas, being under the territorial jurisdiction of no nation, are subject to the laws of no nation, nevertheless the maritime states are content to recognize the right of the maritime courts of each of them to adjudicate upon transactions occurring on the high seas and are content to abide by the result of such adjudications.

For example, a British ship collides with a Dutch ship on the high seas and is libelled in a French admiralty court. A decree of the French court condemning the British ship is valid and conclusive not only in Great Britain but all over the world.⁴ Why? Because all the maritime states have agreed that France may adjudicate upon transactions taking place on the high seas where her forum is sought, and have further agreed to be bound by the result.

The offending ship, as is common knowledge, might be libelled in the proper admiralty court of any nation where jurisdiction could be obtained, because at the moment of the collision a right of property in the ship arose under the law of that nation which

¹ 9 Ben. U. S. 403.

² 18 Fed. 918.

³ P. 920.

⁴ *Croudson v. Leonard*, 4 Cranch (U. S.) 434; *Hilton v. Guyot*, 159 U. S. 113, 167.

its court will enforce, and a decree establishing which will be valid all over the world by reason of the fact that all other nations have consented that such right might be created and that such jurisdiction should be exercised.

In short, by reason of this common consent of the nations, a state may, by that branch of its general law dealing with maritime matters, give a right of action in consequence of transactions occurring outside of its territorial jurisdiction and upon the high seas; and a decree of an admiralty court of such nation enforcing such right will be as universally binding and valid as though rendered in a cause arising out of transactions occurring within its territorial jurisdiction, although one or more or all of the parties be foreigners, and whether the proceeding be instituted by or against foreigners, and whether the result be in their favor or against them.

If, therefore, that branch of the law of France that relates to transactions upon the high seas gave a right of action for death occurring thereon, and a French admiralty court enforced that right in favor of a French citizen against a foreigner, it would seem unmistakably to follow that the decree of the French court would everywhere be regarded as being just as valid as a decree in a suit concerning events taking place within French territorial jurisdiction.

So here, if the libellant had obtained a decree in a French court, it would be regarded as binding in the United States if *in rem*, and just as effectual as any other decree of a French court if *in personam*.

It might conceivably be urged that there is a limit to the jurisdiction which any single nation, by reason of the consent of the other nations, may exercise; that in event of any wide departure from received doctrines it must be presumed that there has been no such consent, and that a decree of a foreign admiralty court proceeding on any such basis should not be treated as valid; that a right of action for death is such a departure, and that an admiralty court of the United States should refuse to recognize the validity of a decree of a French admiralty court awarding damages against a citizen of the United States for causing death on the high seas; that, in short, the French law was incompetent to confer such a right at any rate against any one but a French citizen.

It was some such consideration as this that prompted the Court of Appeals in the Rundell case to declare that "it is not within the

jurisdiction of the legislative powers of any one nation to make the maritime law for the whole world, so far as the courts of other countries are concerned."

Whether, by virtue of the general consent of the nations, as above described, any one nation would be authorized as against the others so to modify its maritime law as to make that maritime which they should unite in declaring to be not maritime, it is not necessary to determine, inasmuch as the cause of action in question is clearly maritime.

The stress laid by the Court of Appeals on the legislative character of the law which it declared no one nation had power to make, raises the preliminary inquiry as to whether a statutory modification of the maritime law would stand on any different footing from a modification by judicial decision.

There can be no ground for laying down the arbitrary proposition that the nations have consented to each other's adjudicating as to transactions on the high seas in accordance with the law of the sea as declared by the courts of the forum and not as declared by its legislature. Either the admiralty jurisdiction is based on a consent which involves such changes within admitted maritime limits as each nation finds necessary or expedient, or it is based on a consent which involves only the maritime law as each nation conceives it, in its pure form, to be. In the latter case a change by judicial decision must be as obnoxious as one by legislative enactment. For example, in *The Genesee Chief*¹ the Supreme Court of the United States declared that the admiralty jurisdiction embraced the Great Lakes, and that therefore the Act of Congress of February 26, 1845,² which purported to extend the admiralty jurisdiction to the Great Lakes was, so far as that was concerned, void and of no effect. What difference could it make to Great Britain, if she were inclined to object to the extension of the *in rem* process and maritime liens to her vessels in a place that had never before been subject to the admiralty jurisdiction, whether that extension resulted from the statute or the decision? There is no basis for any distinction.

Assuming, therefore, that a nation cannot draw within its maritime jurisdiction that which is admittedly not maritime, and that, if any change at all may be made it may be as well by statute as by judicial decision, is there any line beyond which a single state

¹ 12 How. (U. S.) 443.

² 5 Stat. at L. 726.

cannot go in modifying its maritime law, where other nations are involved?

It is very clear, to begin with, that vital changes in the general maritime law have been made by the different maritime states and have been generally acquiesced in.

Take, for instance, the subject of limitation of liability. Here is a matter which the Supreme Court of the United States has repeatedly declared to be peculiarly a subject of admiralty jurisdiction.¹

Limitation of liability has been a well-established principle of the general maritime law of Europe since medieval times. Yet England refused to recognize any such principle until 1734, and then only to a limited extent. Not until 1862 did the principle receive its fullest measure of recognition there, and today the rule is substantially less favorable to shipowners than in almost any other important maritime jurisdiction. While the states of Massachusetts and Maine enacted limited liability statutes in 1818 and 1820, it was not until 1851 that Congress took any action on the matter.²

The rejection by England and the United States of the doctrine of limitation of liability was a modification of the maritime law as generally received.³ It was moreover a modification of the most vital importance. The fiat of the English and American courts at one stroke took away from shipowners a protection which confined their liability to the value of the ship and freight pending, and which in many cases would amount to a complete defense, and substituted in the place thereof an infinite liability.

Yet it was never heard that a decree of an English or American admiralty court before the days of limited liability in those countries holding foreign shipowners to an unlimited liability failed of recognition in foreign countries as a valid decree on the ground suggested.

The extension of the American admiralty jurisdiction to the

¹ *The Scotland*, 105 U. S. 24; *Providence & N. Y. S. S. Co. v. Hill Mfg. Co.*, 109 U. S. 578; *Butler v. Boston S. S. Co.*, 130 U. S. 527, 549; *In re Garnett*, 141 U. S. 1; 13; *Oregon Railroad & Navigation Co. v. Balfour*, 179 U. S. 55, 56.

² *Norwich & N. Y. Transportation Co. v. Wright*, 13 Wall. (U. S.) 104; *The Scotland*, 105 U. S. 24; *Butler v. Boston S. S. Co.*, 130 U. S. 527, 556; *In re Garnett*, 141 U. S. 1, 14; *The Rebecca*, 1 Ware (U. S.) 188; *The Epsilon*, 6 Ben. (U. S.) 378; *Thomassen v. Whitwell*, 9 Ben. (U. S.) 458; *In re Long Island, etc.*, *Transportation Co.*, 5 Fed. 599; *The Katie*, 40 Fed. 480, 494; *In re Whitelaw*, 71 Fed. 733, 734.

³ *Butler v. Boston S. S. Co.*, 130 U. S. 527, 556; *In re Garnett*, 141 U. S. 1, 14; *The Katie*, 40 Fed. 480, 494.

Great Lakes,¹ already referred to, also involved a vital change by which foreign ships might be subjected to the peculiar admiralty process in a large field where the admiralty was never supposed to have any jurisdiction whatever. There is no evidence that England has ever refused to recognize a decree of an American admiralty court pronounced in pursuance of this extension of the admiralty jurisdiction of the United States.

Another striking example is presented by the Harter Act.²

The Act applies to foreign as well as domestic vessels.³ It is narrower than the limited liability acts in applying only to the relations between ship and cargo,⁴ and it is broader in extending a complete, in place of a partial, immunity.

By the general maritime law of Great Britain a stipulation relieving a carrier from responsibility for the negligence of his servants is valid.⁵ The Harter Act declares such stipulations absolutely invalid, thereby following the decisions of the American courts, which refused to enforce such contracts even when they contained a clause providing that the English law should govern.⁶

If, therefore, an American citizen shipped goods by a British ship from a British port to New York under a bill of lading which stipulated that the shipowner should not be responsible for the negligence of the master or crew and that the British law should govern, Sections 1 and 2 of the Harter Act would, if the ship were libelled by the cargo-owner in an American court, deprive the shipowner of the benefit of his stipulation, whether or not he obtained the benefit of the exemption of Section 3. Conversely, if a citizen of Great Britain shipped goods in an American bottom from an American port to Liverpool under a bill of lading not containing any exempting clause, but providing that the English law should govern, the cargo-owner might, under Section 3 of the Act, be deprived of all redress for the loss of his goods if his suit were brought in an American court.

Yet there can hardly be a question that the judgment of the

¹ *The Genesee Chief*, 12 How. (U. S.) 443; *The Hine*, 4 Wall. (U. S.) 555; *The Glide*, 167 U. S. 606, 614; *Water Power Co. v. Water Commissioners*, 168 U. S. 349, 361.

² Act of Feb. 13, 1893, c. 105, 27 Stat. at L. 445.

³ *The Carib Prince*, 170 U. S. 655; *The Silvia*, 171 U. S. 462; *The Chattahoochee*, 173 U. S. 540; *The Etona*, 64 Fed. 880.

⁴ *The Delaware*, 161 U. S. 459.

⁵ *Carver, Carriage by Sea*, 3 ed., 117, § 101.

⁶ *Ibid.* 122, § 103 a.

American courts would in all such cases be recognized as valid in Great Britain.

Further, it is at least questionable how far, prior to the decision in the case of *The Bold Buccleugh*¹ in the year 1851, the maritime law of England gave a lien for collision damage. At one period, at any rate, there was, and perhaps at the present time there is, no lien under the English law in the absence of a personal remedy against the owners. Even in the modern decisions most favorable to the lien it is limited to cases where the collision is caused by the fault of the owner or those who may fairly be said to represent him.² Contrast this doctrine with the broad American rule that gives a lien for collision damage in all cases whatsoever.³

It might well happen that a British ship, libelled in an American admiralty court in a collision case, would be held, under circumstances which would not give rise to a lien according to the maritime law of England. It is not probable, however, that Great Britain would refuse to recognize the validity of such a decree because it involved a modification of the maritime law to which she had not consented.

It thus appears that the different nations have not hesitated to make important changes, both by statutes and by judicial decisions, in the maritime law; that these changes have for the most part been made by each state separately and alone; and that the other states have not failed to acquiesce in adjudications rendered in accordance with these changes, even although their own citizens or vessels were affected.

Assume, however, that there is a line beyond which the nations cannot be presumed to have gone in consenting to each other's jurisdiction as to transactions on the high seas; where is that line to be drawn? Shall we say that in giving this consent the nations had reference to the general maritime law as it was understood at a given period, and that all subsequent modifications or amendments must be disregarded? If so, what is that period of time and who is to determine it? Or is the general maritime law as commonly accepted without reference to any particular period of time

¹ 7 Moo. P. C. 267.

² Abbott, *Merchant Ships and Seamen*, 14 ed., 1011; *Marsden, Collision*, 5 ed., 72, 80 *et seq.*; *Williams & Bruce, Adm. Pr.*, 3 ed., 82; *The City of Norwalk*, 55 Fed. 98, 111.

³ *The Palmyra*, 12 Wheat. (U. S.) 1, 14; *Brig Malek Adhel*, 2 How. (U. S.) 210, 234; *Thorp v. Hammond*, 12 Wall. (U. S.) 408; *The Clarita and the Clara*, 23 *ibid.* 1; *Workman v. The Mayor*, 179 U. S. 552; *The Barnstable*, 181 U. S. 464, 467.

the important feature? In any view, who is to determine what the general maritime law is at any period of time? It is obvious that there would be as many separate answers to these questions as there are maritime nations. Those answers, moreover, would be not unlikely to be conflicting. It is quite certain that each nation would determine for itself what the general maritime law was, and whether or not a particular statute or decision of a foreign tribunal was a departure therefrom. The result could only be confusion.

Even supposing it were possible to arrive at some agreement as to what the general maritime law was at any particular period, still it is not to be presumed unless cogent reasons compel, that the maritime states deliberately bound themselves to a hard and fast system of law unchanging and unchangeable however imperatively the shifting conditions of society might demand modification.

As Mr. Justice Holmes puts it in *The Blackheath*,¹ "It would be a strong thing to say that Congress has no constitutional power to give the admiralty here as broad a jurisdiction as it has in England or France."

The suggestion, though made in a different connection, is wholly pertinent to the present discussion. It is impossible to believe that the nations could have contemplated that the system of law which they had agreed might be administered by each other in relation to maritime affairs should forever remain unalterable. They must have contemplated the possibility of modification. Yet, except in the extremely improbable event of an international agreement, no modification could be effected otherwise than by the maritime states separately.

If the admiralty jurisdiction respecting transactions on the high seas rests on the consent of the different maritime states, as it most assuredly does, those states by force of such consent have the right to adjudicate upon such transactions by the principles of the general maritime law as understood and administered in any state assuming jurisdiction, and as that state in the exercise of a reasonable discretion may, within the limits above referred to, choose to alter or modify it by statute or decision, having due regard to the fact that "the convenience of the commercial world, bound together, as it is, by material relations of trade and intercourse, demands that, in all essential things wherein those relations bring them [the

¹ 195 U. S. 361, 364. See also *The Lottawanna*, 21 Wall. (U. S.) 558; *Butler v. Boston S. S. Co.*, 130 U. S. 527, 555; *In re Garnett*, 141 U. S. 1, 13; *In re Long Island*, etc., Transportation Co., 5 Fed. 599, 616; *The Katie*, 40 Fed. 480, 493.

nations] in contact, there should be a uniform law founded on natural reason and justice."¹

The question is in effect covered, so far as the United States is concerned, by the declarations of the Supreme Court of the United States. In *The Lottawanna*² it was said by Mr. Justice Bradley:

"No one doubts that every nation may adopt its own maritime code. France may adopt one; England another; the United States a third.

"No nation regards itself as precluded from making occasional modifications suited to its locality and the genius of its own people and institutions, especially in matters that are of merely local or municipal consequence and do not affect other nations. It will be found, therefore, that the maritime codes of France, England, Sweden, and other countries are not one and the same in every particular; but that, whilst there is a general correspondence between them arising from the fact that each adopts the essential principles and the great mass of the general maritime law as the basis of its system, there are varying shades of differences corresponding to the respective territories, climate, and genius of the people of each country respectively. Each state adopts the maritime law, not as a code having any independent or inherent force, *proprio vigore*, but as its own law, with such modifications and qualifications as it sees fit. This account of the maritime law, if correct, plainly shows that in particular matters, especially such as approach a merely municipal character, the received maritime law may differ in different countries without affecting the general integrity of the system as a harmonious whole."

And again,

"Congress, undoubtedly, has authority under the commercial power, if no other, to introduce such changes as are likely to be needed."³

¹ *The Lottawanna*, 21 Wall. (U. S.) 558.

² *Supra*.

³ In *The Scotland* it was said by the same learned judge: "English cases have been cited to show that the courts of that country hold that their statutes prior to 1862, which, in generality of terms, were similar to our own, did not apply to foreign ships. . . . We have examined these cases. So far as they stand on general grounds of argument, the most important consideration seems to be this, that the British legislature cannot be supposed to have intended to prescribe regulations to bind the subjects of foreign states, or to make for them a law of the high sea; and that if it had so intended, it could not have done it. This is very true. No nation has any such right. Each nation, however, may declare what it will accept and, by its courts, enforce as the law of the sea, when parties choose to resort to its forum for redress."

The Court of Appeals relied on that part of the above passage which says that no nation has any right to prescribe regulations to bind the subjects of foreign states, or to make for them a law of the high sea. But the context shows that all the court meant to say was that no nation could prescribe regulations which would preclude

But, however this may be, the precise question in this connection is whether the consent of the United States that France should have the right to adjudicate in relation to transactions upon the high seas where citizens of the United States are involved includes the right to give, by statute or judicial decision, an action for death on the high seas, a judgment enforcing which in a French court against a citizen of the United States would be regarded as valid in this country.

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[*To be continued.*]

other nations from operating in the same field. The court recognized the right of every nation to declare what it will accept and by its courts enforce as the law of the sea. If this means anything, it includes the proposition that if the courts of a nation, adjudicating in regard to transactions on the high seas involving foreigners, administer rules which, by reason of modifications of the maritime law enacted by the courts or legislature of the nation, differ from the maritime law as understood in the country of the foreign litigant, the result will nevertheless be acquiesced in by that foreign country, whether the foreigner invoked the jurisdiction or not. When the Supreme Court said that each nation might declare what it will accept and enforce as the law of the sea, it could certainly have meant nothing less than that the decision of a foreign tribunal enforcing its law against an American ship over which it had acquired jurisdiction should on recognized legal principles be acquiesced in by the United States. See also *The Belgenland*, 114 U. S. 355, 370; *Butler v Boston Steamship Co.*, 130 U. S. 527, 556; *In re Garnett*, 141 U. S. 1, 12; *The Manhasset*, 18 Fed. 918, 921; *Workman v New York City*, 179 U. S. 552, 561; *In re Long Island, etc., Transportation Co.*, 5 Fed. 599. *The Katie*, 40 Fed. 480, 493, 494.

EXPROPRIATION BY INTERNATIONAL ARBITRATION.

INTERNATIONAL arbitration is meant, it is believed, to substitute for military conflict, for the heat and friction which at times, even without war, most injuriously divide nations, rouse apprehensions, and destroy beneficial intercourse, for the pressure and intrigue which overcome weaker nations and deprive them of what is justly theirs, to replace all these by a fair judgment between the opposing parties derived from an impartial source, after due hearing to which not only the conduct conforms, but the minds of the contestants yield acquiescence.¹

In the main the principles of international justice are identical with those of private or municipal justice, and we must anticipate and welcome a constant assimilation of the two in procedure and achievement.

A considerable class of conflicts exists, not of rights, with which arbitration now deals, but of needs and interests, with which it wholly fails to deal.

The inability of arbitration to deal with needs which are not rights was never more strikingly illustrated than by the Behring Sea Award. I think it was there made quite plain that a useful industry would be much diminished, if not destroyed, unless it were controlled and regulated. This necessity, however, could be given no weight by the arbitrators; but, it being found that the United States had no right over the Behring Sea beyond the three-mile limit, its attempt to control seal fisheries therein wholly failed, however salutary such control might be, and the award was against it.

National statutes and courts cannot always deal with these questions. There is one class of needs, however, dealt with by municipal law, and dealt with successfully, and with steadily increasing frequency, adequacy, and ease, which is not as yet within the scope of international arbitration.

I refer to that class met by the exercise of what is variously called the Power of Eminent Domain, or Expropriation. A small and private interest is by a just procedure compelled to yield to a

¹ See, for discussion of the judicial character of international arbitration. 7 Moore, *Dig. Internat. Law*, 24.

large and public interest, receiving in return adequate compensation for loss or inconvenience suffered. Formerly under English law it was a power which Parliament exercised and rarely, if ever, confided. Now it is everywhere provided for by statutory proceedings largely controlled by the courts. It has rendered possible many of the greatest undertakings, and especially those which have made intercourse between remote regions convenient and beneficial, and such intercourse and the interdependence that ensues are as great humanizing, peace-making, and civilizing factors in the world as we can name; and has alike aided on a vast scale reclamation of swamp lands and arid regions by artificial drainage or irrigation.

Mr. Randolph, in his learned work on eminent domain, points out¹ that "The right of eminent domain can be exercised only within the jurisdictional limits of the state. These limits are usually territorial. . . . It is, of course, inconceivable that a sovereign should contemplate the direct expropriation of property within a foreign state. Such action would be clearly unwarrantable." And the late David Dudley Field² treats the right as limited to the territory of the sovereign exercising it, except that he may condemn, "with the consent of any other nation, property within the territory limits of such other nation."

With the energetic advance of engineering science problems of this sort, which are interstate and international, have recently arisen with striking frequency. The courts are confronted with the plain proposition that no state can exercise the right of eminent domain within the sovereignty of another, and human convenience and necessity are defied.

The subject "Eminent Domain" is indexed and described by some writers on international law as Grotius, Puffendorf, and Vatell.³ But it will be found that they deal merely with expropriation within the nation and leave the international question untouched.

The case of Naboth's vineyard, often cited as the earliest precedent, is not international.⁴

Mr. Randolph shows⁵ that "During the seventeenth and eigh-

¹ Randolph, *Em. Domain*, 27.

² Field, *Internat. Code*, 2 ed., 20.

³ See Lewis, *Em. Domain*, 9; Grotius, *Peace and War*, c. 8, § 21; Puffendorf, *B. 8*, c. 55r (English translation, 1703); 1 Vatell, *Law of Nations*, B. 1, c. 44, § 245.

⁴ Randolph, *Em Domain*, 3

⁵ P. 5.

teenth centuries the manifestations of the right of eminent domain increased, owing to the extension and gradually centralized administration of public works and the growth of equitable judicial ideas."

He argues that the realty of a foreign minister which is foreign territory for some purposes may be subjected to the right of eminent domain simply because the ultimate sovereignty is in the local government,¹ and in a note says: "The method by which the old Protestant cemetery at Rome was taken for a municipal use is not without interest. This cemetery was placed under control of the Prussian representative near the papal court many years ago, and was managed thereafter by the Prussian, and later by the German representative, with whom were associated a committee representing the other Protestant powers. The city of Rome decided to lay out a street through the cemetery, and after a correspondence, in which the power to expropriate does not seem to have been questioned, the German embassy ceded the cemetery to the city authorities, who on their part ceded a tract for a new cemetery, assumed the expense of reinterment, and further agreed to preserve the tomb of Keats."²

The question has been discussed whether a railway chartered by federal law, and given by that law the right of eminent domain, can condemn state land. Mr. Randolph collects the cases to the point that United States rights are in this higher than state rights, but that the agencies of the state are beyond federal aggression,³ and suggests that the power of a state must yield when acquisition by the federal government is more important to the United States than its retention is to the state. For example, although a necessity might arise to warrant the expropriation of a state capitol for a fortification site, it should not be assumed to justify the transformation of a capitol into a post-office, though he points out this view conflicts with an illustration of Justice Brewer in *St. Louis v. W. U. Tel. Co.*,⁴ where he seems to think the capitol could be taken by the railway on paying its value. These questions are, however, wholly constitutional.

Take a few cases in point, however, which have arisen between the states of the United States of America or between wholly independent nations as examples and illustrations of interstate needs

¹ P. 54.

² P. 56.

³ See Parl. Pub. Italy, No. 1, 1887.

⁴ 118 U. S. 92.

and difficulties in the lines indicated. Of course the cases arising within the United States may involve also constitutional considerations which we need not consider; but, though made justiciable by the constitution, they turn mainly or wholly on rules of international law.

New York City needs to take advantage of adjacent territory for its water supply. A large part of that territory belongs to New Jersey. The State of New York cannot authorize any appropriation of the waters of New Jersey, and it is even doubtful whether the State of New Jersey can authorize condemnation of property within her borders to serve the public utilities of any neighboring state. Thus in the recent case of *McCarter v. Hudson Co. Water Co.*,¹ the court says: "We have been privileged to see in print an opinion recently submitted to the Merchants' Association of New York by Mr. Randolph, author of the well-known work on eminent domain, upon the question of an interstate water supply for that city. Referring to that interest in water which each state possesses as the guardian of its community, he says, 'I think it is clear that the right of an individual or a corporation to divert water, whether gained by public grant or by prior appropriation, is presumed to be utilized within the state, which may forbid the carriage of the water beyond its bounds.' Again he uses this language, 'And, when we point out that each state holds all the property in its territory free from the eminent domain of another, and cannot be compelled to surrender its property to another in any way, I think we approximate the irreducible measure of sovereignty in this relation.'" The court goes on to hold that neither the state nor people of New York have any inherent right to withdraw a supply of water from the territory of New Jersey by artificial means, so that some millions of citizens on one side of a boundary line may not get the advantage of a convenient water supply unappropriated and flowing unused to the sea, even on making due compensation to all concerned, because a boundary line intervenes and there is no known means of getting over that imaginary obstacle.

Yet a good water supply materially lowers the death-rate of a city and so protracts human life. Though Professor Westlake has said, concerning the right of self-preservation recognized in international law,² that "one great function of law is to tame it," yet, if law would limit such a fundamental right, it ought only to be upon a good reason given.

¹ 65 Atl. 498 (N. J.).

² Westlake, *Internat. Law*, c. 8, p. 3.

Controversy has arisen between Kansas and Colorado as to the right of the latter to appropriate the waters of the Kansas River. That important stream rises in the Colorado mountains and flows for about 280 miles through the territory of that state, and then for about 310 miles through the territory of the State of Kansas. The matter has been twice carried to the Supreme Court of the United States by the latter state, in an attempt to prevent the diversion of the waters of the river by or under the authority of the upper state.

In 1902, in *Kansas v. Colorado*,¹ that court recognized that "the remedies resorted to by independent states for the determination of controversies raised by collision between them were withdrawn from the states by the Constitution. A wide range of matters susceptible of adjustment and not purely political in their nature were made justiciable by that instrument," and therefore the court entertained a bill by the State of Kansas to prevent Colorado from diverting or authorizing the diversion of the waters of this river.

In the present year the court dismissed this suit without prejudice to like suit at a later time, on the ground that Kansas had as yet showed no substantial injury.² No method appears by which for most necessary and valuable purposes of mining and irrigation Colorado could obtain the right to divert this water beyond such use as is legal to riparian proprietors if it inflicted substantial injury on Kansas, though it might do vastly greater good to Colorado, and she might be able and willing to pay for such injury twice over. The case illustrates the difficulties arising from a boundary line, which seems insurmountable even between states in such close alliance as those of this Union.

A controversy involving like difficulties has arisen between the states of Missouri and of Illinois concerning the disposal of the drainage of Chicago, the second city of the nation, with a rapidly increasing population of between two and three millions. By a great canal the festering waters of the stagnant Chicago River, which are cleansed by no rising and falling marine tide, are made to run backward and to draw a plentiful supply of pure water from Lake Michigan, and, thus diluted, to ultimately discharge into the great stream of the Mississippi River. The State of Missouri bordering on this river, deeming itself injured,

¹ 185 U. S. 125.

² *Kansas v. Colorado*, 206 U. S. 46.

brought suit against Illinois and the Sanitary District of Chicago.¹ And the Supreme Court of the United States held that such suit was maintainable if damage could be shown, but that there was none shown; and the court says, "If Missouri were an independent and sovereign state, all must admit that she could seek a remedy by negotiation, and that failing by force."

Here again, no matter what the necessity of Chicago or her willingness to make adequate payment, a boundary line prevents an adjustment of rights by condemnation and compensation.

These are merely recent conspicuous and familiar examples of an inconvenience that has been felt a thousand times between separate nations no less than between the states of this Union.

Very great interests required the Suez Canal. The concessions for it were fortunately got; but, if they had been denied, ought the great interests to be sacrificed to the small or compelled to get the concessions by force or overawing?

The Panama Canal is demanded likewise by interests of the vastest extent and most imperative character, shared in by a great part of the world. Concessions have been obtained, but there are those who complain that they were extorted. That question I do not care to discuss; but I ask whether a beneficent project of world-wide importance ought to be absolutely defeated if a local power denies such concessions?

A recent most destructive war which cost many lives and much treasure was largely fought for the possession of a port deemed essential by one power for the great interior country which she already possessed. In the recent South African war deep embarrassment arose from the possession of the interior by one power and of the only port giving access to the same by another.

The claims concerning Alaska, now happily adjusted between the two friendly and kindred nations involved, were made important, and at one time almost difficult, by the possession, for instance, of the Port of Skagway by one country and the possession by another of a greatly developing country of wide extent behind and tributary to it.

Exactly the same complication which arose between Colorado and Kansas as to the Kansas River embarrassed the relations of the United States and Mexico with regard to the Rio Grande River. The waters of that international stream were so exhausted in Colorado and New Mexico that frequently the lower river bed was left

¹ *Missouri v. Ill. and the Sanitary District of Chicago*, 180 U. S. 208.

dry during the greater part of the year for a distance of 500 miles. The treaty between the two nations of May 21, 1906, has adjusted this difficulty by providing for the erection of a great dam at Eagle in New Mexico and for the equitable division of the water between the two nations.

I recur to the beneficial assimilation of international to municipal law and rights. Not so many years ago a corporation, in whose favor the right of eminent domain had been exercised, could not be dispossessed by any subsequent exercise of like right in favor of another. So it was a matter of the utmost difficulty for a canal company or railway company to get the right to cross another. That is now very commonly provided for fully and freely in all cases of necessity.

It will be recalled that the late David Dudley Field, in his "International Code," provided for the condemnation of property in other sovereignties, "with the consent" of such other sovereignty, and Mr. Randolph records an interesting suggestion from an ancient source, saying,¹ "In the Athenian constitution of Aristotle [citing 4 Kenyon's Trans. 72] we are told that a quarrel between Athens and Eleusis was settled upon this condition.

"Among others, if any of the seceding party (discontented Athenians) wish to take a house in Eleusis, the people would help them to obtain the consent of the owner; but, if they could not come to terms, they should appoint three valuers on either side, and the owner should receive whatever price they should appoint."

This comes near to a treaty right of condemnation.

I write without the Algeciras convention before me, but I notice that Morocco has recently adopted regulations regarding expropriation under the general act of Algeciras.²

Treaties and international conventions are becoming so full in their friendly provisions, and so completely recognize the community of interest of persons on different sides of boundary lines, that it seems as if we might hope that any international inconvenience would soon be abolished.

M. Merignhac, in his "Traité de Droit public international première Partie," considers recent movements toward international concert in matters of law, and mentions the *consulta* of 1904 between France and Italy as showing a new era in the approaches of the nations to one another. That provides that a citizen of either who has money deposited in the postal savings bank department

¹ Randolph, Em. Domain, 3.

² 1 Am. J. of Internat. L. 752.

of one nation may, if he removes to the other, have it transferred to his credit in the like department of his new domicile.

Such agreements make us hope that even the difficulty between nations that has been spoken of may be modified and perhaps removed by general treaties which allow rights of eminent domain in foreign territory for important public service corporations, even if they do not concede territory or jurisdiction. It is a bold dream which conceives of the award, upon due compensation, of a port or of territory very necessary to one power and of small consequence to another, but peace and commerce more and more hold the imaginations of men and war less and less, and this would be one of the victories of peace. Let us fix no limit to them. International arbitral tribunals will undoubtedly become permanent bodies with appointed sessions. The right of eminent domain within a nation's boundaries, formerly rarely exercised, and then by the highest sovereign authority of the state,¹ is now easily and constantly invoked and exercised at the suit of public service companies under statutory provisions largely supervised by the courts. With the growth of international interdependence instead of independent isolation, we may begin to hope for like useful functions and powers under international arbitration.

The establishment of international prize courts for the adjudication of claims to captured vessels and their contents has been advocated by many eminent jurists, as Professor Westlake and Sir Thomas Barclay;² and was approved even so early as 1887 by the Institute of International Law, to say nothing of the recent action of the conference at the Hague. International tribunals dealing with condemnation of property rights for the common good by proceedings kindred with those under which the right of eminent domain is now exercised are but a moderate advance beyond such international courts for the condemnation of prizes.

The writer is indebted to Hon. Everett P. Wheeler, of New York, for the ingenious suggestion that the Constitution of the United States forbids any state of the Union "without the consent of Congress" to "enter into any agreement or compact with another state"; that in case of necessity Congress might, therefore, authorize or consent to such agreements or compacts between the several states as seemed required for the adjustment of serious difficulties of the character herein indicated.

¹ See 1 Bl. Comm., B. 1, c. 1, §139 *et seq.*

² See Problems of International Practice and Diplomacy, 105.

An agreement between the states involved to allow expropriation on due compensation made and to submit the whole matter to arbitration, if Congress gave its consent, might be a possible solution of the New York and New Jersey, Kansas and Colorado, Illinois and Missouri problems above indicated, but in so far as the rights of individuals in real property would necessarily be involved it is somewhat uncertain how far this procedure could be made constitutional and practicable, and in so far as in any case it amounts to a surrender of territorial or jurisdictional rights fixed by constitutional provisions, it seems probably beyond the competence of merely statutory action.

The subject has many intricacies and difficulties, the solution of which is not here attempted; but it is submitted that it is among the extensions of arbitration to be considered and wisely shaped by publicists and statesmen.

Even if the nation surrenders in part its right just as the individual loses his property right, it is upon due compensation made. It is part of "the growth of equitable judicial ideas," already alluded to, and, as Mr. T. A. Walker has pointed out,¹ as a result of the needs of international intercourse the strict principles "of territorial sovereignty and its corollaries must be at times affected and relaxed. The progressive improvement of human nature necessarily involves the progressive development of international law." To aid such development should be the very high function of all students of that noble and by no means stagnant part of jurisprudence. Lawyers must not deserve the taunt of Voltaire, who called them the conservers of old abuses, but their ingenuity and prudence must wisely shape a safe and lasting progress. They must help towards the attainment of that "Peace of Justice" which President Roosevelt has pictured as the goal set before all mankind.

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¹ Walker, *Internat. Law*, 10, § 1895.

AGREED VALUATION AS AFFECTING THE LIABILITY OF COMMON CARRIERS FOR NEGLIGENCE.

THE rule that a common carrier may not relieve itself by contract from liability for loss or damage to goods due to its negligence is now generally accepted, yet even with courts professing to follow it there is an increasing disposition to limit recovery against the carrier to the amount agreed upon between the carrier and the shipper as the value of the shipment, though loss occurs through the carrier's negligence. We purpose to examine briefly the decisions sustaining such limitations and to consider their significance in relation to the general rule, assuming that this rule is accepted as settled law.

It is obvious that a court which rejects this general rule, and allows a common carrier to relieve itself by contract from liability for negligence, will in like manner sustain a partial exemption from such liability. The partial exemption may be in form the limitation of liability to a specific sum or the valuation of the goods at some definite figure.¹ In either case the limit of recovery even for negligence is fixed. These decisions do not, however, explain how a court refusing to allow the limitation of liability for negligence can consistently in such case uphold an agreed valuation. They require no comment save that, in accordance with a well-established principle, any doubt as to whether a stipulation under consideration does or does not include loss by reason of negligence must be resolved in favor of the latter view and against the carrier.²

Where, however, carriers are not permitted to contract away their liability for negligence, the courts have decided with practical unanimity that a stipulation, without reference to attempted valuation, that liability in case of loss shall be limited to a sum specified

¹ *Manchester, etc., Ry. Co. v. Brown*, 8 App. Cas. 703; *Great Western Ry. Co. v. McCarthy*, 12 App. Cas. 218; *M'Cance v. London & Northwestern Ry. Co.*, 7 H. & N. 477 (Exchequer), 3 H. & C. 343 (Exchequer Chamber); *Belger v. Dinsmore*, 51 N. Y. 166; *Magnin v. Dinsmore*, 62 N. Y. 35, 70 N. Y. 410; *Zimmer v. New York Central, etc., R. R. Co.*, 137 N. Y. 460.

² *Westcott v. Fargo*, 63 Barb. (N. Y.) 349, 61 N. Y. 542; *Vrooman v. American, etc., Express Co.*, 2 Hun (N. Y.) 512; *Marquis v. Wood*, 61 N. Y. Supp. 251.

is, in case of loss through negligence, invalid.⁸ There is manifest reason for this holding, since it is difficult to understand how a carrier, if it may not relieve itself from liability for negligence up to the total value of the goods carried, may nevertheless in effect stipulate for non-liability as to one-half or nine-tenths or ninety-nine hundredths of their value.⁴

An agreement of this nature, not even purporting to be based upon the value of the goods carried, discloses an obvious effort of the carrier to escape liability beyond the fixed sum, and contains none of the extenuating elements which in cases of so-called agreed valuation have induced the courts to sustain such valuation as a limit of liability. In fact, Mr. Hutchinson explains the divergence of the decisions upon the question of the exempting of the carrier from liability beyond a fixed amount as depending on whether the contract in question limits liability to a certain sum or constitutes a *bona fide* valuation of the goods.⁶ This explanation cannot, however, be accepted as adequate, for while stipulations in form limiting liability to a certain amount are everywhere invalid,⁶ the decisions are not harmonious where the agreement in form fixes the value of the goods.⁷ These decisions are not free from difficulty and form the material for this discussion.

⁸ *Eells v. St. Louis, etc., Ry. Co.*, 52 Fed. 903; *Schwarzchild v. Nat'l S. S. Co.*, 74 Fed. 257; *Mobile, etc., R. R. Co. v. Hopkins*, 41 Ala. 486; *Georgia Pacific Ry. Co. v. Hughart*, 90 Ala. 36; *Galt v. Adams Express Co.*, MacArthur & M. (D. C.) 124; *Georgia R. R. & Banking Co. v. Keener*, 93 Ga. 808; *Central of Georgia Ry. Co. v. Murphey & Hunt*, 113 Ga. 514; *Central of Georgia Ry. Co. v. Hall*, 124 Ga. 322; *Chicago & Northwestern Ry. Co. v. Chapman*, 133 Ill. 46; *K. C., etc., R. R. Co. v. Simpson*, 30 Kan. 645; *Adams Express Co. v. Hoeing*, 8 Ky. L. Rep. 154, 9 Ky. L. Rep. 814; *Moulton v. St. Paul, etc., Ry. Co.*, 31 Minn. 85; *Southern Express Co. v. Moon*, 39 Miss. 822; *Chicago, etc., R. R. Co. v. Abels*, 60 Miss. 1017; *Southern Express Co. v. Seide*, 67 Miss. 609; *Doan v. St. Louis, etc., Ry. Co.*, 38 Mo. App. 408; *U. S. Express Co. v. Backman*, 28 Oh. St. 144; *Pittsburg, etc., Ry. Co. v. Sheppard*, 56 Oh. St. 68; *Ambach v. B. & O. R. R. Co.*, 4 Oh. Dec. 467; *Coward v. East Tennessee, etc., R. R. Co.*, 16 Lea (Tenn.) 225; *Ry. Co. v. Wynn*, 88 Tenn. 320; *Southern Pacific Ry. Co. v. Maddox*, 75 Tex. 300; *St. Louis, etc., Ry. Co. v. Robbins*, 14 S. W. 1075 (Tex.); *Galveston, etc., Ry. Co. v. Ball*, 80 Tex. 602; *Virginia, etc., R. R. Co. v. Sayers*, 26 Grat. (Va.) 328; *Maslin v. B. & O. R. R. Co.*, 14 W. Va. 180; *Abrams v. Milwaukee, etc., R. Co.*, 87 Wis. 485.

As to the Massachusetts decisions see comment in note 10.

⁴ See, for example, *Baughman v. Louisville, etc., R. R. Co.*, 94 Ky. 150; *Ry. Co. v. Wynn*, 88 Tenn. 320.

⁵ Hutchinson, *Carriers*, 2 ed., Mechem, § 249 *et seq.*

⁶ Except, of course, in New York and perhaps in Massachusetts. See *infra*, note 10.

⁷ Thus even in cases of agreed valuation the following jurisdictions deny the validity of such stipulations in cases of negligence: *Overland Mail & Express Co. v. Carroll*, 7 Colo. 43; *Adams Express Co. v. Stettaners*, 61 Ill. 184; *Southern Express*

The leading decision in this group of cases is *Hart v. Pennsylvania Railroad Co.*⁸ Hart sued the Pennsylvania Railroad to recover damages for the breach of a contract to transport certain horses from Jersey City to St. Louis. Through the carrier's negligence⁹ one of the horses was killed and four were injured. Hart claimed to recover damages to the amount of \$19,800, offering to prove that the horses were worth, the one killed, \$15,000, and the others from \$3000 to \$3500 apiece, and that his loss was as stated. This evidence was excluded on the ground that the contract of shipment provided that the carrier assumed "liability on the stock to the extent of the following agreed valuation: If horses or mules, not exceeding two hundred dollars each." On appeal to the Supreme Court of the United States it was decided that notwithstanding the carrier's negligence Hart's recovery should be limited to the agreed valuation.

Prior to this decision there was much indefiniteness of principle in the reported cases, and a decided lack of agreement. It has subsequently, however, been followed in many jurisdictions,¹⁰ the

Co. v. Marks, etc., Co., 40 So. 65 (Miss.); *Orndorff & Co. v. Adams Express Co.*, 3 Bush (Ky.) 194; *Baughman v. Louisville, etc., R. R. Co.*, 94 Ky. 150; *Cincinnati, etc., Ry. Co.'s Receiver v. Graves*, 21 Ky. L. Rep. 684; *Ill. Cent. Ry. Co. v. Radford*, 23 Ky. L. Rep. 886; *Hughes v. Pennsylvania R. R. Co.*, 202 Pa. St. 222. *Elkins v. Empire Transportation Co.*, 81* Pa. St. 315, did not involve negligence. The statement to the contrary is evidently an error of the reporter: *Weiller v. Penna. R. R. Co.*, 134 Pa. St. 310. The decision by Judge Hare in *Newburger v. Howard*, 6 Phila. (Pa.) 174, cited by the court in the Hart case, and in accord therewith, was rendered before the Supreme Court of Pennsylvania had decided otherwise. It is noteworthy that Chief Justice Mitchell has consistently dissented from the Pennsylvania decisions, and in the latest case, *Hughes v. Railroad*, he is joined by Mr. Justice Brown. *Galveston, etc., Ry. Co. v. Ball*, 80 Tex. 602; *Houston, etc., Ry. Co. v. Williams*, 31 S. W. 556 (Tex.).

In states where statutes or the state constitution forbid common carriers to vary their common law liability, stipulations as to agreed valuation have been held to be within the prohibition of the statute. *Lucas v. Burlington, etc., Ry. Co.*, 112 Ia. 594; *St. Louis, etc., Ry. Co. v. Sherlock*, 59 Kan. 23; *Ohio, etc., Ry. Co. v. Taber*, 98 Ky. 503; *Ill. Cent. R. Co. v. Radford*, 23 Ky. L. Rep. 886; *Pacific Express Co. v. Hertzberg*, 42 S. W. 795 (Tex.); *St. Louis, etc., Ry. Co. v. McIntyre*, 82 S. W. 346 (Tex.).

⁸ 112 U. S. 331. There is a very satisfactory collection of the cases citing this decision in 10 *Rose, Notes to the U. S. Reports*, 896.

⁹ In the report of the case in the lower court, 7 Fed. 630, it is said that the loss was due to the *gross* negligence of the carrier.

¹⁰ *St. Louis, etc., Ry. Co. v. Weakly*, 50 Ark. 397; *Peirce v. Southern Pac. Co.*, 47 Pac. 874 (Cal.); *Coupland v. Housatonic R. R. Co.*, 61 Conn. 531; *Georgia Southern Ry. Co. v. Johnson*, 121 Ga. 231; *Louisville, etc., Ry. Co. v. Nicholai*, 4 Ind. App. 119; *Adams Express Co. v. Carnahan*, 63 N. E. 245 (Ind.); *Smith v. American Express Co.*, 108 Mich. 572, *semble*; *Alair v. Northern Pac. R. R. Co.*, 53 Minn. 160; *Harvey v. Terre Haute, etc., R. R. Co.*, 74 Mo. 538; *Brown v. Wabash, etc., Ry. Co.*, 18 Mo. App.

courts in some instances practically repudiating, though professing to distinguish, their earlier decisions,¹¹ and it now represents the prevailing view. Nevertheless in some states its soundness is questioned and a contrary rule established.¹²

It must not be forgotten that whatever may be the theory underlying this decision, its result is to relieve the carrier from obligation to pay to the shipper the full value of the goods, and that, too, though the loss has happened through the carrier's negligence. Since the general rule forbidding the limitation of liability for negligence is so well settled, it becomes of importance to inquire by what reasoning this conclusion is reached.

The Hart case, and other decisions in accord with it, suggest "estoppel" as the foundation upon which they may be rested.¹³

568; *Duntley v. Boston & Maine*, 66 N. H. 263; *Durgin v. American Express Co.*, 66 N. H. 277; *Ballou v. Earle*, 17 R. I. 441; *Johnstone v. Railroad Co.*, 39 S. C. 55; *Richmond, etc., R. Co. v. Payne*, 86 Va. 481; *Loeser v. Chicago, etc., R. Co.*, 94 Wis. 571; *Ullman v. C. & N. W. R. Co.*, 112 Wis. 150; *Robertson v. Grand Trunk Ry. Co. of Canada*, 24 Can. Supreme Ct. 611.

Curiously enough the Massachusetts cases do not make the distinction prevailing generally in the other decisions between a limitation of liability to a specific sum and an agreement of valuation at that sum, but uphold the fixed limit of liability if reasonable, basing their conclusions apparently on the test as settled in England by statute, *vis.*, whether in the mind of the court the contract limiting liability is reasonable. See *Phillips v. Earle*, 8 Pick. (Mass.) 182; *Squire v. New York Cent. R. R. Co.*, 98 Mass. 239. In this case, *e. g.*, the stipulation was to the effect that the carrier should "not for any cause be held liable beyond the sum of \$200 for injury to, or loss of, any single animal carried pursuant to this agreement, *although the actual value of such animal may exceed that amount.*" *Graves v. Lake Shore, etc., R. R. Co.*, 137 Mass. 33; *Hill v. Boston, etc., R. R. Co.*, 144 Mass. 284; *Brown v. Cunard Steamship Co.*, 147 Mass. 58; *Hood Co. v. American Pneumatic Service Co.*, 77 N. E. 638 (Mass.).

Among the earlier decisions, also, the distinction is frequently overlooked, but since the Hart case it has been recognized almost universally.

¹¹ Thus with *Great Southern R. R. Co. v. Little*, 71 Ala. 611, compare *L. & N. R. R. Co. v. Sherrod*, 84 Ala. 178; with *Kallman v. U. S. Express Co.*, 3 Kan. 198, and *K. C., etc., R. R. Co. v. Simpson*, 30 Kan. 645, compare *Pacific Express Co. v. Foley*, 46 Kan. 457; with *Coward v. East Tennessee, etc., R. R. Co.*, 16 Lea (Tenn.) 275, compare *Ry. Co. v. Sowell*, 90 Tenn. 17, and *Starnes v. Railroad*, 91 Tenn. 518; with *Brown v. Adams Express Co.*, 15 W. Va. 812, compare *Zouch v. Chesapeake & Ohio R. Co.*, 36 W. Va. 524. In this connection the Ohio decisions are specially interesting. In *Ry. Co. v. Simon*, 15 Oh. Cir. Ct. Rep. 123, the lower court distinguishes the earlier Ohio cases of *U. S. Express Co. v. Backman*, 28 Oh. St. 144, and *Pittsburg, etc., Ry. Co. v. Sheppard*, 56 Oh. St. 68, and accepts the Hart case. On appeal the decision is affirmed on another ground, to wit, that the judgment of the Circuit Court involved the weight of the evidence, *Ry. Co. v. Simon*, 63 Oh. St. 598; but the opinion of the Supreme Court in *Wells, Fargo & Co. v. Bell*, 65 Oh. St. 408, shows, we believe, that it is not unlikely that Ohio will follow the federal decision.

¹² See *supra*, note 7.

¹³ *Hart v. Pennsylvania Railroad Co.*, 112 U. S. 331, 341; *Georgia Southern Ry*

Since the carrier incurs liability for the safety of the goods, he is entitled, as all the cases agree, to be informed of the extent of that liability; in other words, he has a right to know the value of the goods, since the care required of him is properly proportioned in some degree to such value. His liability is in the nature of that of an insurer,¹⁴ and his compensation is in consequence made up theoretically of two elements,—one a consideration for the services of transportation, the other for the risk assumed. As with other insurers, the extent of that risk helps to determine his charge. When, therefore, the shipper, to secure a lower rate, misrepresents the value and the carrier is misled by such misrepresentation, and loss occurs *in consequence* of the lower valuation, a case is presented to which the principle of estoppel is applicable.

Some cases disclose all these facts, and are properly rested on the basis of estoppel.¹⁵ Under modern conditions of transportation goods known to be valuable are, as a rule, accorded greater care than is bestowed upon goods of little apparent value. As a consequence, it sometimes happens that in the same catastrophe all the latter are saved, whereas the former are lost. In such case, where a valuable parcel, represented otherwise, has been lost, the loss occurs because the true value has been misrepresented by the shipper. The loss is really due to the shipper's own act, and consequently should impose no liability on the carrier. Where, however, loss would have occurred, even though the true value had been stated, the carrier has not been injured by the misrepresentation of the shipper, save that he has not received as high a rate of freight as he would have charged had the true value

Co. v. Johnson, 121 Ga. 231; *Graves v. Lake Shore, etc., R. R. Co.*, 137 Mass. 33; *Richmond, etc., R. Co. v. Payne*, 86 Va. 481; etc.

¹⁴ It should always be remembered that, though the common law liability of the carrier is in certain respects the liability of an insurer, the fact that he is the bailee of the goods insured is of vital importance in determining whether or not rules with respect to the contract of insurance are to be applied in an unmodified form to this particular contract. In the cases under consideration it is essential to keep this in mind, in view of the rule requiring generally the richest good faith in the negotiations of the contract of insurance.

¹⁵ See *Sleat v. Fagg*, 5 B. & Ald. 342, particularly Bayley's comment on *Batson v. Donovan*, 4 B. & Ald. 21; *Earnest v. Express Company*, 1 Woods (U. S.) 573; *Oppenheimer v. U. S. Express Co.*, 69 Ill. 62. Cf. *Southern Express Co. v. Everett*, 37 Ga. 688, and *Everett v. Southern Express Co.*, 46 Ga. 303. In the Hart case the court says that what the shipper did "tended to lessen the vigilance the carrier would otherwise have bestowed," but it does not appear that the loss was due to the fact that vigilance had been diminished in consequence of such valuation.

been declared. It cannot be contended logically that he has been injured by assuming a greater liability than he intended to assume,¹⁶ for the very question is whether he has assumed such liability, and the result of imposing it on him cannot be given as a reason for its imposition or non-imposition. Furthermore, unlike a private individual, he is compellable to accept the responsibility, and his right is restricted to insisting on freight money properly proportioned to the services he renders and the risk he incurs. It is difficult, therefore, to understand how a decision can be rested on the estoppel theory where the misrepresentation in no way operates as an element in causing the loss.

Furthermore, since estoppel, properly considered, arises only where a misrepresentation has actually misled to his damage the individual to whom it is made, estoppel can play no proper part when the carrier *knows* the true value of the goods shipped and is consequently not misled by the shipper's valuation. In such case no reason exists for refusing to allow the shipper to contradict his assertion of value, unless reliance can be placed upon the contractual obligation.

Estoppel, therefore, as a theory upon which to explain these cases, has a proper place only where the carrier does not know¹⁷ that the true value is misstated, and where the misrepresentation of value enters into the loss as at least a contributing cause.

Few cases recognize this. Even in the Hart case, the question of the carrier's knowledge is practically ignored. Counsel for the shipper asserts in argument that the carrier knew the value was greater than that named in the printed contract before it received the goods for shipment; but comment on this knowledge, or lack of knowledge, is conspicuously absent in the opinion of the Supreme Court, and likewise in the opinion of the court below.¹⁸

¹⁶ See *Graves v. Lake Shore, etc., R. R. Co.*, 137 Mass. 33, where the court says. "He imposes upon the carrier the obligations of a contract different from that into which he entered." Since the carrier is compellable to accept the goods he cannot say that *non constat*, but that if he had known the true value he would not have entered into the contract. It was his duty to enter into it, and unless the misrepresentation of value has in some manner contributed to the loss, the carrier has *in this particular instance* been damaged only to the extent to which the compensation received by him has been less than he might have demanded. It is on account of the loss to him *in the aggregate* from such diminished compensation that he should be protected. See *infra*.

¹⁷ See cases *infra*, note 19.

¹⁸ In *Black v. Goodrich Transportation Co.*, 55 Wis. 319, the court says that in the Hart case in the lower court it appeared that there was no evidence that the carrier

While, therefore, Mr. Justice Blatchford refers to estoppel as a reason for his decision, it is doubtful whether this principle can be accepted as satisfactory.

If, then, the estoppel theory is inadequate, except in the limited class of cases referred to, the decision can apparently be rested only on the basis of contract. It is important, therefore, to discover the exact limitations of the rule, since its effect is to restrict the operation of the general principle that liability for negligence may not be limited by contract even partially.

Here, again, if the carrier knows the true value of the goods shipped, it is not easy to understand on what theory can be explained the conclusiveness of the agreed valuation where loss or damage results through negligence. Certainly the mere form of the contract cannot control the result, and since the carrier and the shipper in the case supposed are both cognizant of the true value of the goods shipped, the placing of a lower valuation thereon is a patent effort to absolve the carrier from a portion of his liability. Where, then, there is negligence, a reduced rate allowed in consequence is of no more effect than a consideration given for any other agreement discountenanced by the law. The decisions are practically unanimous to the effect that where the stipulation is in form a limitation of liability to a specified amount, such limitation will not be upheld in cases of negligence, and why a different result should be reached because the parties with full knowledge of all the facts cast their agreement into the language of agreed valuation, is one for which we confess ourselves unable to give a reason.

It is freely admitted that the cases have not turned on the question of the carrier's knowledge or ignorance of the true value. Reference thereto has frequently been made,¹⁹ but it has received

knew of the extraordinary value of the shipment, but it is impossible to discover this in the report of the lower court's decision in 7 Fed. 630. In the Supreme Court the opinion of the court leads to the inference that the carrier was misled as to value, since the court speaks of "fraud," "imposition," "misrepresenting the nature or value of the articles," but it is rather surprising to find no more definite reference to the question of actual deception. It is impossible to draw with assurance any inference with respect to this question from the statement that: "Although the horses, being race-horses, may, aside from the bill of lading, have been of greater real value than that specified in it, whatever passed between the parties before the bill of lading was signed was merged in the valuation it fixed; and it is not asserted that the plaintiff named any value, greater or less, otherwise than as he assented to the value named in the bill of lading by signing it." This is the closest reference to the carrier's knowledge to be found in the court's opinion.

¹⁹ See, for example, the following: *Earnest v. Express Co.*, 1 Woods (U. S.) 573;

little emphasis. In some cases it has been distinctly repudiated as an essential element²⁰ and, as already pointed out, it is quietly ignored in the Hart case.²¹

Such ignorance or knowledge on the part of the carrier of the true value of the goods should constitute, we believe, the decisive factor in determining the validity or invalidity of a stipulation as to agreed valuation, where loss occurs through negligence. While such a rule might seem to introduce an uncertain element into what should be precise and easily determined, the burden would be upon the shipper who has agreed to another value to prove that the carrier through the agent accepting the goods had knowledge of their true value. Under such circumstances the rule would not wear an impracticable aspect, and it is not a case where third parties may be misled to their damage by the terms of the bill of lading. The carrier's duty should be to ship only at the true value, where known, so far as his liability for negligence is involved, since attempted limitation of this liability to a fixed sum is not permissible. If the courts sustain contracts of this kind, entered into with full knowledge on both sides of true value, simply because they take the form of agreed valuation,²² an important exception has developed to the general rule forbidding contracts by common carriers limiting liability for negligence, and it would

Overland Mail & Express Co. v. Carroll, 7 Colo. 43; *Southern Express Co. v. Everett*, 37 Ga. 688, 46 Ga. 303; *Georgia R. R. & Banking Co. v. Keener*, 93 Ga. 808; *Georgia Southern Ry. Co. v. Johnson*, 121 Ga. 231; *Adams Express Co. v. Carnahan*, 63 N. E. 245 (Ind.); *Orndorff & Co. v. Adams Express Co.*, 3 Bush (Ky.) 194; *Baughman v. Louisville, etc., R. R. Co.*, 94 Ky. 150; *Kember & George v. Southern Express Co.*, 22 La. Ann. 158; *Alair v. Northern Pacific R. Co.*, 53 Minn. 160; *Southern Express Co. v. Stevenson*, 42 So. 670 (Miss.), it is doubtful whether there was negligence in this case; *Harvey v. Terre Haute, etc., R. R. Co.*, 74 Mo. 538; *U. S. Express Co. v. Backman*, 28 Oh. St. 144; *Railway Co. v. Simon*, 15 Oh. Cir. Ct. Rep. 123; *Levy v. Southern Express Co.*, 4 Rich (S. C.) 234.

In *Beck v. Evans*, 16 East 244, Lord Ellenborough refused to limit the recovery to the £5, according to the terms of the then customary notice, on the ground that the carrier knew the value of the goods; but this principle seems to have been lost sight of in later cases, even before the passage of the Acts of Parliament in reference to the limitation of liability. *Levi v. Waterhouse*, 1 Price 280; *Marsh v. Horne*, 5 B. & C. 322.

²⁰ *Douglas Co. v. Minn. Transfer Ry. Co.*, 62 Minn. 288, where the decision is made to turn on the fairness of the valuation. In this case the real value was about four and one-half times the agreed value. Mr. Justice Canty, in concurring, says that the rule "should be watched closely, as in practice it is liable to lead to evasion and abuse on the part of the common carrier." *Southern Express Co. v. Owens*, 41 So. 752 (Ala.); *Southern Ry. Co. v. Jones*, 132 Ala. 437. See also note 26.

²¹ See *supra*, note 18.

²² See *infra*, note 32.

be difficult to reconcile such decisions with what have been held to be patent efforts to limit liability where the stipulation takes the form of limiting damages recoverable to a specific sum without regard to value.²³

Notwithstanding the scant favor which this suggested criterion has in terms been accorded in the decisions, a study of the reasons suggested by the courts will disclose a possible approach to such criterion under the guise of other considerations. Such contracts as to agreed valuation, it is said, must be "fairly made," "*bona fide*," "just and reasonable," and "based on a reasonable consideration." As to this last element, some courts have held that there must be a distinct consideration in the form of a lower freight rate for the stipulation as to valuation,²⁴ and in general it is agreed that the stipulation as to value must be sustained by consideration. If, however, it is the true value, it would seem but logical to regard the consideration of carriage as sustaining all the agreements of the shipper, provided the tariff schedule is based upon relative value, and the very requisite that there must be a special consideration suggests the inference that by the fixing of a lower value than the true one the carrier is being partially relieved from liability.

Obviously, as a mode of protecting the carrier against fanciful and exaggerated valuations, and of liquidating the damages in advance, an agreed valuation commends itself to every one. Since value is a matter of opinion, where such agreed value is reasonably close to the true value, courts might hold that the spirit of the rule forbidding limitation of liability for negligence is not violated by upholding such agreed valuation. By it greater certainty in business transactions is obtained, and litigation in many instances avoided, since frequently the main purpose of such litigation is to determine the extent of the carrier's liability rather than its existence. Accordingly some cases have made the validity of the valuation depend solely on its approximating with reasonable

²³ See *supra*, note 3.

²⁴ *Southern Express Co. v. Hill*, 98 S. W. 371 (Ark.); *Adams Express Co. v. Harris*, 120 Ind. 73; *McFadden v. Mo. Pac. Ry. Co.*, 92 Mo. 343; *Kellerman v. Kan. City, etc., R. R. Co.*, 136 Mo. 177; *Gardner v. Southern R. R.*, 127 N. C. 293; and shipper may show that an alleged reduced rate is really not such, *McFadden v. Mo. Pac. Ry. Co.*, *supra*; *Conover v. Pac. Express Co.*, 40 Mo. App. 31; *Ward v. Mo. Pac. Ry. Co.*, 58 S. W. 28 (Mo.); but where the contract sets forth that the rate is a reduced one, the burden is on the shipper to show the contrary. *Evansville, etc., R. Co. v. Kevekordes*, 69 N. E. 1022 (Ind.).

accuracy the true value of the goods,²⁵ and that, too, though the carrier had no knowledge whatever of the real value.²⁶ The curious result is reached in these last-mentioned cases that the more a man misrepresents the value of his goods to a carrier, the more likely he is to recover their true value where that carrier is negligent. Of course, if the carrier knows the true value, then, on the principle for which we are contending, the holding is correct, but in the cases referred to knowledge on the part of the carrier is distinctly negated.

²⁵ *Murphy v. Wells, Fargo & Co.*, 108 N. W. 1070 (Minn.). In this instance 550 cases of strawberries were shipped at an agreed valuation of \$50. They were worth about \$2000 and \$330 was paid for freight. The court holds the stipulation not just or reasonable. It is obvious that the carrier *knew* that \$50 was not a *bona fide* valuation. As already pointed out, the same court sustained a valuation in *Douglas Co. v. Minn. Transfer Ry. Co.*, 62 Minn. 288, where the true value was about four and one-half times the agreed value. In *Gardner v. Southern R. R.*, 127 N. C. 293, stone, agreed value \$46.60, real value \$218, was shipped and the agreed valuation is held not conclusive. Here the court relied also on the fact that no consideration for the agreement as to valuation was shown. In *Nashville, etc., Ry. Co. v. Stone & Haslett*, 79 S. W. 1031 (Tenn.), a case of hogs worth two or three times the agreed value, the agreement is held unreasonable and void. So also *Schwarzchild v. Nat'l Steamship Co.*, 74 Fed. 257, where a valuation of £1 per animal is held unreasonable. *South & North Ala. R. R. Co. v. Henlein*, 52 Ala. 606, 56 Ala. 368. With *Ga. Pac. Ry. Co. v. Hughart*, 90 Ala. 36, compare *Western Ry. Co. v. Harwell*, 91 Ala. 340. And yet in the case of the shipment of horses the value has often varied widely from the agreed valuation. Thus in the *Hart* case itself, where the agreed value of the horses was \$200 each, the shipper offered to prove that the real value of one of them was \$15,000. Numerous cases involving the transportation of live stock show a similar variance. It is apparent that in the case of such transportation there is a peculiar opportunity for the extravagant and fanciful valuations of which the courts have seemed so fearful. See the dissenting opinion in *South & North Ala. R. R. v. Henlein*, *supra*, where this is admitted, though the judge is opposed to permitting the agreed valuation to be conclusive in the ordinary case.

²⁶ *Southern Express Co. v. Owens*, 41 So. 752 (Ala.), and *Southern Ry. Co. v. Jones*, 132 Ala. 437. In this latter case a suit to recover damages for the negligent loss of a horse valued at \$100, alleged to be worth \$1500, the court says at page 442: "The question is not what the parties knew or intended, but what is the effect of the stipulation; not whether the parties intended evil or knew their act was hurtful to the public, but whether to allow and uphold such contracts would be fraught with wrong and injury to the people of a character from which it is the province and duty of government to protect them. So it is immaterial, when a carrier has stipulated for a limitation of damages resulting from his negligence to a greatly disproportionately small valuation of the property carried, whether he knew or was informed of its real value or not. It is against the public good in respect of a matter of governmental concern that he should be allowed to make such stipulation under any circumstances; and to allow it to stand in any instance or upon any consideration would be to emasculate the principle of public policy obtaining in the premises, and to leave the public exposed to all the uncertainties incident to inquiries into what carriers intended, or knew, or had been informed as to the real value of the property transported by them."

It is not clear precisely what is intended by an agreed valuation just and reasonable in its terms, unless that the agreed value must be reasonably close to the true value. If this is its meaning, then its bearing has already been considered. On the other hand, there is possibly an unconscious regard at this point for the provision of the English statute law with reference to the limitation of liability and the decisions of the English courts thereunder upholding these agreed valuations even in cases of negligence.²⁷ In fact, the court in the Hart case distinctly refers to the rule of the statute of Great Britain as "the proper one to be applied in this country, in the absence of any statute." In view, however, of the cases holding that a limitation in form to a specified sum is invalid in cases of negligence, this seems a conclusion without a reason unless we incorporate the idea, heretofore referred to, that the value fixed is sufficiently near the true value to be so held by the court, upon the principle *de minimis*, etc., or unless we add the proviso that it is just and reasonable only where the carrier does not know the true value. It is quite possible, for reasons which will be referred to later, to regard it just and reasonable to sustain these agreed valuations even in case of negligence, where the carrier does not know the true value. But where such value is known to him, it is not clear, under the existing decisions as to limitations not in the form of agreed valuation, how such agreed valuation can be sustained as just and reasonable where the agreed value varies from the true value otherwise than to a negligible degree.

It is possible that a court might take the view that limitation, actual and intended, is, within limits, to be permitted as just and reasonable when voluntarily agreed to by the shipper in the face of opportunity to ship at full value. This is perhaps the explanation of the Massachusetts cases,²⁸ and there is much to be said in its favor, but it is a view logically impossible for a court which refuses to allow any stipulation in form purporting to limit liability for negligence to a specific sum.²⁹

Courts have not defined with precision what is intended by a contract fairly made or entered into *bona fide*, but these phrases seem to involve at least two thoughts: first, that there must be a

²⁷ 1 Wm. IV., c. 68; 17 & 18 Vict., c. 31, § 7; *McCance v. L. & N. W. Ry. Co.*, 7 H. & N. 477, 3 H. & C. 343; *Manchester, etc., Ry. Co. v. Brown*, 8 App. Cas. 703; *Great Western Railway Co. v. McCarthy*, 12 App. Cas. 218.

²⁸ See *supra*, note 10.

²⁹ See *supra*, note 3.

reasonable opportunity for the shipper to ship his goods at their true value and at a reasonable rate,⁸⁰ and second, that the contract must not be an obvious attempt to evade the general principle as to limiting liability for negligence.⁸¹ The former of these reasons needs no comment: it is self-explanatory. As to the latter, it approaches, we believe, very close to recognizing the carrier's knowledge of the true value as the test of good faith. In all the cases the shipper presumptively knows the value of his own property, and the term can hardly be intended to apply to him. Where the carrier with full knowledge that the property is worth greatly more than the agreed value enters into a contract for its transportation at such agreed value as the basis of liability in case of loss, such contract can hardly be called one entered into in good faith if he intends to rely on it in case of negligent loss. If this is not what the "good faith" means, it is not easy to discover its significance. True it is, the cases which have held that contracts fixing an agreed valuation were not to be sustained because they evidenced an effort to evade the law depend almost invariably upon an explanation of the language of the contract as showing no real valuation. We refer, however, in the note to some cases which support in a measure the view we are suggesting.⁸²

⁸⁰ Manchester, etc., Ry. Co. v. Brown, 8 App. Cas. 703.

⁸¹ See *infra*, note 32.

⁸² The cases considering whether a stipulation is in substance a partial limitation of liability or a *bona fide* agreed valuation are of special interest. Eells v. St. Louis, etc., Ry. Co., 52 Fed. 903; Schwarzschild v. Nat'l Steamship Co., 74 Fed. 257; Georgia Pacific Ry. Co. v. Hughart, 90 Ala. 36; Galt v. Adams Express Co, MacArthur & M. (D. C.) 124; Central of Georgia Ry. Co. v. Murphey & Hunt, 113 Ga. 514; Moulton v. St. Paul, etc., Ry. Co., 31 Minn. 85; Doan v. St. Louis, etc., Ry. Co., 38 Mo. App. 408. In Newburger v. Howard, 6 Phila. (Pa.) 174, decided by Judge Hare and upholding an agreed valuation in a case of negligence before the Pennsylvania rule was settled otherwise, it is said that the carrier may require information as to value, etc., but that "such conditions must, however, be imposed in good faith, and not as a means of effecting an object which the law would not permit to be attained directly."

In Central of Georgia Ry. Co. v. Hall, 124 Ga. 322, the court holds that in a clear case the question is for the court, in a doubtful case for the jury, whether a stipulation is an agreed valuation or an attempt to limit liability.

The stipulation has at times taken the form of an agreement that the valuation of the goods shall depend on their value at the time and place of shipment, Pierce v. Southern Pac. Co., 47 Pac. 874 (Cal.), though the value at the point of shipment was only about one-half that at the point of destination. South & North Ala. R. R. Co. v. Henlein, 52 Ala. 606, 56 Ala. 368; L. & N. R. R. Co. v. Oden, 80 Ala. 38. Such stipulation has been upheld. Since, however, transportation is generally for the purpose of securing a higher price than that available at the shipping end, this seems an obvious effort to limit liability. Ruppel v. Allegheny Valley Ry., 167 Pa. St. 166:

This view constitutes, we believe, the true basis for these decisions. Where the carrier is proved to have had knowledge of the real value of the goods shipped, then neither by virtue of estoppel nor by virtue of contractual obligation is there ground for sustaining an agreed valuation in case of negligence, so long as the general rule as to limiting the liability of a common carrier for negligence is recognized and the cases refusing validity to contracts in form limiting liability to a fixed amount remain unquestioned.

But where the carrier does not know the true value, and the shipper in order to secure reduced rates misrepresents such value, there are adequate grounds for sustaining such agreed valuation. In such case the carrier has not attempted to limit his liability.⁸³ He is ready to carry at the full risk, but such risk being unknown to him he asks the shipper to fix it. His compensation is properly adjusted accordingly. Since the carrier's liability resembles that of an insurer, it is evident that each charge presumptively contains an increment as compensation for the risk. If the shipper knows that his valuation will not avail the carrier in case of negligence, he will in all probability misrepresent it constantly, since in most cases loss occurring will be due to negligence. In all cases where the goods are safely carried he saves a certain percentage of the freight, and therefore deprives the carrier of his just compensation, not merely in the one case where loss occurs, but in the ninety-nine where it does not. Therefore the carrier, if he is to be held liable for the real value in case of loss, must increase all his charges. The result is that the shipper who ships at an honest valuation must pay for the loss sustained by the man who misrepresents value. This places a premium on such fraud and produces a detriment to the community in general—not merely to the carrier—and accordingly is opposed to the public interest. Furthermore, the shipper has withheld from the carrier the freight money he has saved in the ninety-nine cases, and in the one case where loss occurs seeks to recover full value for his lost freight without surrendering such sum. The injustice of this is forcibly pointed out by Baron Bramwell in a characteristic opinion in *Manchester, Sheffield & Lincolnshire Ry. Co. v. Brown*.⁸⁴

Rhymer v. D. L. & W. R. R. Co., 27 Pa. Super. Ct. 345; *Houston, etc., Ry. Co. v. Williams*, 31 S. W. 556 (Tex.).

⁸³ See *Hart v. Pennsylvania Railroad*, 112 U. S. 330, 340.

⁸⁴ 8 App. Cas. 703.

In all cases of common carriers the broad principles must result from the multiplicity of instances in which the carrier serves the public and the individual shipper, and while to restrain it from wilfully and knowingly endeavoring to relieve itself from negligence—now regarded a vital principle—contracts with this purpose must be held void; on the other hand, where it is ready honestly to perform its duties, it and the public generally must be protected from the act of the shipper who seeks to secure a low rate of freight by misrepresenting value. In these cases, therefore, the shipper should be denied recovery beyond the value declared by him. It is in a sense a penalty on him to restrain him from such misrepresentations, which, were the other view taken, would result in detriment to the community. The principle bears a faint though suggestive resemblance to the avoidance of a deed in the hands of the person who has altered it in a material part.

Such a modification does not, as the cases point out, encourage negligence. The carrier knows that for negligence he will be liable up to a fixed valuation, and accordingly gives to the parcels the care demanded by their value. Since the measure of due care is dependent to some extent upon value, it is to be expected that the law should lend its countenance to a rule ensuring the carrier's knowledge of the true value of goods entrusted to him.

Once more it is to be noted that these principles which justify the sustaining of an agreed valuation apply in the cases where the carrier does not know the value, and lose their significance entirely where, in whatever way it may happen, the value is disclosed to him. There is, it is submitted, no basis upon which agreed valuation in such cases can be sustained, so long as the rule as to limiting liability for negligence to a fixed sum remains law.⁸⁵

The Hart case and its fellows seem to be the fruit of a graft upon the old case of *Gibbon v. Paynton*.⁸⁶ But in that case there was a misrepresentation in substance as to *the contents* of the parcel sent. The carrier had given notice, held sufficient, to the effect that he would not be answerable for money unless delivered to him as such and paid for accordingly. When the money in question was delivered in an old mail bag, with no notice thereof, it was a clear representation that the bag did not contain money. There never was a true bailment of the money, and the liability of carrier could not properly attach. There is a vast difference between imposing upon a carrier without his knowledge the possession, if we may use

⁸⁵ See the cases cited in note 3.

⁸⁶ 4 Burr. 2298.

this term in a loose sense, of certain goods, and agreeing with him as to the value of an article the nature of which he well knows. There are a number of cases like *Gibbon v. Paynton*, where the carrier is deceived as to the class of goods entrusted to him,⁸⁷ and while there is no doubt as to their soundness, it is questionable whether they can correctly be referred to as the source of the rule as to agreed valuation. Properly this rule applies only where the carrier has really been misled, and then results from the necessity of protecting the carrier and the public from the effect of continued misrepresentations in cases where the resulting rule does not furnish a stimulus to negligence.

It is interesting to note that more than half of the decisions have been rendered in cases of the transportation of live stock, principally horses, and the difficulty of determining their exact value in any case, but particularly in a case where they are of special breed or are valuable as race horses, furnishes an argument of some weight, it is admitted, in appealing to a court to hold the shipper to the value he has declared.⁸⁸ To this, we believe, is largely due the fact that the decisions have not more clearly recognized the importance of the carrier's knowledge or ignorance of the true value of the bailment. But unless the requirements of the courts that the contract must be "*bona fide*" and "*fairly made*," shall ultimately be construed to be a recognition of such knowledge or ignorance as the decisive factor in the case, it is impossible to regard these decisions otherwise than as disclosing a modification of the general rule as to limiting liability for negligence.

Herein lies their real significance, and it is this that renders them of importance. Between the two apparent possibilities, the law will develop, we believe, into a recognition of the importance of the carrier's knowledge or ignorance of the real value of the goods carried, for the policy of the rule forbidding the limitation by common carriers of their liability for negligence is, under present conditions of transportation in this country, so generally accepted that its modification is not probable.

Henry Wolf Bickel.

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⁸⁷ See, for example, *Southern Express Co. v. Everett*, 37 Ga. 688, 46 Ga. 303; *Chicago, etc., R. R. Co. v. Thompson*, 19 Ill. 578.

⁸⁸ See the dissenting opinion in *South & North Alabama Railroad v. Henlein*, 52 Ala. 606.

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THE LAW SCHOOL. — More than the usual number of changes are to be announced. The requirements for the first year are to be increased by the addition of a course on Agency conducted by Professor Wambaugh. This change, although under contemplation for some time, is of an experimental nature, to be continued only if it proves successful. Professor Beale is to give second year Equity, and will be assisted in Criminal Law by Mr. S. H. E. Freund, LL. B. 1903, and Mr. A. A. Ballantine, LL. B. 1907. Professor Brannan will resume his courses on Bills and Notes and Partnership. Assistant Professor Warren will conduct Property I, and Quasi-Contracts will be conducted by Mr. L. F. Schaub, LL. B. 1906. Two new courses are announced for the second half year. Dean Ames will give a new course on Persons as well as the regular course on the same subject, and Professor Beale is to give a course on Municipal Corporations. Admiralty will again, as two years ago, be given by Mr. C. F. Dutch, LL. B. 1905, who will also conduct Equity III, and similarly the extra course on Massachusetts Practice will be conducted by Mr. Jeremiah Smith, Jr., LL. B. 1895, son of Professor Smith.

Owing to unexpected delays, Langdell Hall is not yet ready for general occupancy, and is in use only for lectures.

THE COMPARATIVE POWERS OF THE LEGISLATIVE AND JUDICIAL BRANCHES OF THE FEDERAL GOVERNMENT. — In a suit by the State of Kansas to restrain Colorado from using water from the Arkansas River for irrigation purposes the United States sought to intervene, claiming power in Congress to legislate on this question as incidental to the reclamation of large tracts of public land in the vicinity. *Kansas v. Colorado*, 206 U. S. 46. Article IV, § 3 of the Constitution gives Congress "power to dispose of and make all needful regulations respecting the territory or other property belonging to the United States." The courts have not yet reached the adjustment between the federal authority acquired thereby and that of a state, when the United States owns unceded land in such state. Broadly, the states must not

interfere with the right of Congress to control,¹ but it is also said the states' sovereignty is not restricted.² The Supreme Court here held that, as the power claimed for Congress would involve legislative control over the states, it was not granted under this constitutional provision. But the United States advanced another ground, upon which it based its claim of federal right to legislate, — the doctrine of "sovereign and inherent power." This was, in effect, that as the states can legislate solely concerning their internal affairs, and as all legislative power must be vested in the states or the federal government, the power to legislate concerning matters national in their scope — of which the present case was one — must therefore of necessity be in the federal government. The court answered this by drawing attention to the Tenth Amendment and by explaining its provisions. As pointed out in a previous decision,³ also by Mr Justice Brewer, this provision has hitherto been given too little consideration and effect. The court in vigorous language here declared that by the Tenth Amendment there are reserved to each state all powers over its internal affairs not prohibited to it or granted to the federal government by the Constitution, and that all powers over affairs national in scope not granted to the federal government are reserved to the people. To this timely exposition no exception can be taken.⁴

As Kansas owned lands on the Arkansas River, the state was unquestionably the plaintiff in interest.⁵ And this was certainly a justiciable controversy between states.⁶ Consequently this case seems similar to a number of others in which the Supreme Court has taken jurisdiction. But it is noteworthy that the court here built up an altogether new ground upon which to base its assumption of jurisdiction. This may be summarized thus: the United States is a nation, and as such its judicial power extends to all justiciable controversies in which it can reach by process the persons or property involved; by the Constitution, Article III, § 1, this entire judicial power was vested in the Supreme and other federal courts, and § 2 is neither a limitation nor an enumeration, but merely a declaration, leaving unrestricted the grant of the entire judicial power, unless there be limitations expressed elsewhere in the Constitution. Before this, the court had relied on the clause in § 2 which in terms extends its jurisdiction to controversies between two or more states.⁷ Also, Jay,⁸ Marshall,⁹ Story,¹⁰ and other notable justices¹¹ of that court have said with more or less emphasis that

¹ *Wisconsin R. R. v. Price County*, 133 U. S. 496; *Van Brocklin v. Tennessee*, 117 U. S. 151.

² *United States v. Railroad Bridge Co.*, 27 Fed. Cas. 686, 692. See *State v. Bachelder*, 5 Minn. 223; *Woodruff v. North Bloomfield Co.*, 18 Fed. 753.

³ *Turner v. Williams*, 194 U. S. 279, 295.

⁴ To the same effect, see Mr. Justice Story in *Martin v. Hunter's Lessee*, 1 Wheat. (U. S.) 304, 324, and in his "Constitutional Law," 5 ed., § 1907.

⁵ The plaintiff state must be the party in interest. *New Hampshire v. Louisiana*, 108 U. S. 76; *Louisiana v. Texas*, 176 U. S. 1. But Kansas might have been the party in interest without owning the land. *Missouri v. Illinois*, 180 U. S. 208; *Kansas v. Colorado*, 185 U. S. 125.

⁶ *Missouri v. Illinois*, *supra*; *Hans v. Louisiana*, 134 U. S. 1, 15.

⁷ *Rhode Island v. Massachusetts*, 12 Pet. (U. S.) 657; *South Dakota v. North Carolina*, 192 U. S. 286.

⁸ *Chisholm v. Georgia*, 2 Dall. (U. S.) 419, 475.

⁹ *Cohens v. Virginia*, 6 Wheat. (U. S.) 264, 378, 383.

¹⁰ *Martin v. Hunter's Lessee*, *supra*, 328, 333.

¹¹ *Rhode Island v. Massachusetts*, *supra*, 728; *Robertson v. Baldwin*, 165 U. S. 275, 279.

§ 2 is an enumeration or definition of the judicial power granted in § 1. In the same decision in which the court pointed out so clearly the limitations on Congress, it seems to have stated its own jurisdiction in terms wider than ever before. It will be interesting to observe whether the court will carry out consistently the doctrine here expressed, and if it does, what the effect will be on its jurisdiction.

STATE COMPELLING A CARRIER TO FURNISH A PARTICULAR FACILITY. — The theory of state control of intra-state commerce has long been established.¹ It is also settled that the exercise of this power is subject to the restrictions of the Fourteenth Amendment.² The primary duty of a common-carrier is to furnish adequate facilities for the public service which it has undertaken.³ Whether or not it falls within this duty to furnish some particular facility must depend on many considerations, chief among which are the cost to the carrier and the necessity of the public.⁴ The necessary effect of the enforcement of the duty to furnish an additional facility is to increase the cost of service rendered. If this new facility should produce directly a return sufficient to cover its cost and allow to the carrier a reasonable profit, no constitutional difficulty is encountered. But it is highly probable that a compelled facility will not be self-supporting. Such a case arose recently when a state ordered a carrier to operate a passenger train in order to make an important connection with a train on another route. Although the mere cost of operation exceeded considerably the probable returns from passengers carried on this train, the Supreme Court of the United States held that the enforcement of the order did not constitute a taking of property without due process of law, on the ground that the carrier would still be able to realize a reasonable profit on its entire intra-state business. *Atlantic Coast Line R. R. Co. v. North Carolina Corporation Commission*, 206 U. S. 1. The contention that compulsion to furnish a non-remunerative facility constitutes a taking of property without due process of law must rest on the theory that the carrier is entitled to adequate compensation for each item of service rendered. If this be true, all hope of efficient regulation of public service companies is at an end. The utter impossibility is apparent of devising a scheme of rates high enough to permit a profit on the carriage of each item of commerce over all possible divisions of the road, which will at the same time afford needed protection to shippers.⁵

In determining whether or not an order which results in increasing the cost of service is confiscatory, the cost of the performance of that service may properly be set off against the total returns from its fulfilment. It is a necessary result of this rule that losses which the carrier may incur on certain individual shipments will be distributed among other users of the service. If in the application of the rule only the total cost and earnings of the carrier should be considered, this burden might become very oppressive, since it would permit the state to compel the rendering of one or more distinct classes of service at a loss which in the end would be borne by users

¹ *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1, 194; *Smyth v. Ames*, 169 U. S. 466, 526.

² See *Smyth v. Ames*, *supra*.

³ *Cf. People v. St. Louis, etc., R. R. Co.*, 176 Ill. 512, 524.

⁴ See *Wisconsin, etc., Railroad v. Jacobson*, 179 U. S. 287, 300.

⁵ *Cf. St. Louis, etc., Ry. Co. v. Gill*, 156 U. S. 649, 665.

of other branches of the service.⁶ This result, however, does not necessarily follow from the reason which supports the rule. The public duty of the carrier is a multiple one, a duty to adequately perform each class of service which it undertakes, and the courts may well require that the carrier shall not be compelled to increase the cost of performance of any individual class of service to such a point that it will be unprofitable. In the matter of confiscatory rates the Supreme Court has shown a disposition to hold confiscatory a rate on a single class of merchandise which will not allow to the carrier adequate compensation for that class of service.⁷ This principle applies equally well when the state attempts to increase the cost of a service by compelling the furnishing of additional facilities. Thus an order to operate a particular passenger train at a loss is not confiscatory if the total receipts from passenger traffic — in which class of service the order properly belongs — supply that reasonable profit which other persons are permitted to make in their business ventures.

THE TAXABLE SITUS OF PROMISSORY NOTES. — Tangible personal property is taxable where actually located, and if so taxed the maxim *mobilia sequuntur personam* cannot be invoked to give an artificial situs at the owner's domicile.¹ The law as to the taxation of intangible personal property is in confusion. Since a debt, as such, can have no actual situs, the standard rule is to tax the asset to the creditor at his domicile.² But when the credit is evidenced by some tangible object, such as a note or a bond, an attempt to tax this object itself is frequently made. That credits in the form of public securities, state and municipal bonds, and bank notes, may be given a taxable situs at the place where they are found, is well recognized.³ The tendency has been to extend this doctrine to all evidences of debts which have assumed concrete form. Mr. Justice Brewer has said: "notes and mortgages are of the same nature [as bonds, etc.] . . . and have such a concrete form that we see no reason why a state may not declare that if found within its limits they shall be subject to taxation."⁴ This principle, declared to be law by numerous judges and text books,⁵ receives a serious setback by a recent decision of the Supreme Court that the notes of an Ohio debtor, held in Indiana by the agent of the New York creditor, could not be given a taxable situs in Indiana. *Buck v. Beach*, 206 U. S. 392. The court returns to the old distinction between notes and specialties, treating the former as mere evidences of debt and not as taxable property in themselves. But why one rule should be applied to a municipal bond and another to a note is difficult to understand. Both are evidences of a debt and have a tangible form and a marketable value, and both are for many purposes treated as tangible property. Thus notes are regarded as being

⁶ *Smyth v. Ames*, *supra*, 540, 541, holding that a state may not justify low intrastate rates on the ground of large interstate profits.

⁷ *Minneapolis, etc., R. R. Co. v. Minnesota*, 186 U. S. 257.

¹ *Union, etc., Co. v. Kentucky*, 199 U. S. 194. See 20 HARV. L. REV. 138.

² *Kirtland v. Hotchkiss*, 100 U. S. 491.

³ See *State Tax on Foreign Held Bonds*, 15 WALL. (U. S.) 300, 324; *Scottish, etc., Co. v. Bowland*, 196 U. S. 611.

⁴ *New Orleans v. Stempel*, 175 U. S. 309, 322.

⁵ See *Jefferson v. Smith*, 88 N. Y. 576, 585; *Judson, Taxation*, § 394; *Gray, Lim of Taxing Power*, § 86.

"goods and wares and merchandise" within the statute of frauds,⁶ may be seized in a replevin suit,⁷ and may be made subject to levy and sale on execution.⁸

The present holding, however, while it attacks the alleged basis of numerous decisions, will probably not affect the result in such cases in the future. Thus in cases under the inheritance or succession tax laws, the transfer of notes can still be taxed, because what is really taxed is not the notes as property but the transfer.⁹ Again in states where a non-resident is carrying on a business, perhaps merely that of loaning money, he can still be taxed on his credits, since the real basis of this tax is not the physical presence in the state of the evidences of the credits, but the transaction of business under the protection of the state laws. Accordingly, it has been held that business credits of a non-resident may be taxed, although the notes evidencing them are out of the state,¹⁰ or although the only evidences are memorandum checks,¹¹ or even open book accounts,¹² or a bank deposit.¹³ Nevertheless, the present decision is to be regretted, since it checks the tendency toward a uniform rule that all substantial evidences of debt are taxable where found. The court claimed to be influenced by the desire to avoid double taxation. But the more efficacious method would be to follow the analogy of tangible personalty, allow all notes, bonds, etc., to be taxed where held, and then to decide that the maxim *mobilia sequuntur personam* should apply only in the absence of an actual situs.

THE FIDUCIARY CHARACTER OF DIRECTORS. — It is universally acknowledged that directors stand in a fiduciary relation to the corporation, but the extent and effects of this relationship are in dispute. The very common statement that they are trustees is palpably inaccurate, since they do not hold the legal title to the corporate property.¹ Like a trustee, a director must use reasonable care² and act in the utmost good faith,³ but he is not liable for errors in judgment,⁴ nor for wrong-doing by a co-director not imputable to him in fact.⁵ In common with other fiduciaries, he will be prevented from profiting directly or indirectly by an abuse of his position,⁶ and will be compelled to surrender to the corporation any rebates or bribes⁷ he may receive.⁸ However, while most fiduciaries must surrender the benefit of any bargain they may make in connection with the *res*,⁹ a director may

⁶ Baldwin v. Williams, 3 Met. (Mass.) 365.

⁷ See Pritchard v. Norwood, 155 Mass. 539, 542.

⁸ Brown v. Anderson, 4 Mart. (N. S.) (La.) 416.

⁹ Blackstone v. Miller, 188 U. S. 189.

¹⁰ Metropolitan, etc., Co. v. New Orleans, 205 U. S. 395. See 20 HARV. L. REV. 656.

¹¹ State Board v. Comptoir Nat. d'Escompte, 191 U. S. 388.

¹² People v. Barker, 157 N. Y. 159.

¹³ New Orleans v. Stempel, *supra*.

¹ Olney v. Land Co., 16 R. I. 597, 598.

² Vance v. Phoenix Co., 4 Lea (Tenn.) 385; 15 HARV. L. REV. 479.

³ New Memphis Gaslight Co. Cases, 105 Tenn. 268, 289.

⁴ Movius v. Lee, 30 Fed. 298.

⁵ Wardell v. R. R., 103 U. S. 651.

⁶ Rutland Light Co. v. Bates, 68 Vt. 579. See Metropolitan Bank v. Heiron, 5 Ex. D. 319.

⁷ A director may break with impunity a contract to use his authority or influence illegitimately. Noel v. Drake, 28 Kan. 265.

⁸ Van Horne v. Fonda, 5 Johns. Ch. (N. Y.) 388.

purchase unmatured obligations of the corporation at a discount, and enforce them at par if the corporation has not a sinking fund for the same purpose.⁹ That in another respect a director is subject to less limitations than most other fiduciaries,¹⁰ is the effect reached by a recent New Jersey case in holding that he may buy corporate property at an execution sale on a judgment held by him. *Marr v. Marr*, 66 Atl. 182 (Ct. of Ch.). The weight of authority supports this result, and also his right to purchase when he forecloses a mortgage on the corporate property.¹¹ Furthermore, by the majority opinion, he may buy at a sale resulting from execution or foreclosure by another, or by order of trustees with power to sell.¹² But the corporation may have the sale set aside in any of these cases if the director has been guilty of any fraud or even of unconscionable conduct,¹³ and the courts will demand a high degree of *bona fides*.¹⁴

Concerning the limitations imposed by the fiduciary relation upon the director's right to deal with the corporation, there seems to be the greatest uncertainty. Occasionally the argument is raised against these transactions that after all the directors are dealing with themselves, so that there is an identity of parties.¹⁵ This is legally fallacious, since one party is the artificial legal entity, the corporation. We must distinguish the case where a director is an agent appointed to achieve some end. In doing so he cannot deal with himself, on elementary principles of agency,¹⁶ aside from the fact that he is a director, or that his principal is a corporation. When one or more directors contract with the corporation, a minority of the courts hold the contract voidable¹⁷ at the election of the corporation on the ground of policy:¹⁸ they would remove entirely the temptations attendant upon interests antagonistic to the corporation. There is a little authority declaring such a contract void.¹⁹ But a majority of the courts hold such a contract good when there was a majority voting for it exclusive of the interested directors, and when, after a most careful scrutiny, they can find no trace of bad faith, unfairness, or concealment.²⁰ This would seem to be the better view, for it sufficiently protects the corporation and yet leaves open to both it and the directors the opportunity for a mutually beneficial contract. With but little dissent a mortgage given by a disinterested majority to a director for money advanced is held good when the transaction is *bona fide*, and the director is permitted to foreclose.²¹ Also, a director may sue for a quasi-contractual obligation incurred by the corporation in his favor, and upon

⁹ St. Louis, etc., R. R. v. Chenault, 36 Kan. 51; Glenwood v. Syme, 109 Wis. 355.

¹⁰ Marshall v. Carson, 38 N. J. Eq. 250.

¹¹ Lucas v. Friant, 111 Mich. 426; New Memphis Gaslight Co. Cases, *supra*. *Contra*, Re Iron Clay Co., 19 Ont. 113.

¹² Janney v. Minneapolis Exposition, 79 Minn. 488; Harts v. Brown, 77 Ill. 226. But see Hoyle v. Plattsburg, etc., R. R., 54 N. Y. 314, 329.

¹³ Hallam v. Indianola Co., 56 Ia. 178.

¹⁴ There is a conflict as to whether a director owes any fiduciary obligations to the stockholders. See Stewart v. Harris, 69 Kan. 498; 17 HARV. L. REV. 58. When the corporation becomes insolvent, the directors are fiduciaries for the creditors. Olney v. Land Co., *supra*.

¹⁵ See Haywood v. Lincoln Co., 64 Wis. 639, 647.

¹⁶ Story, Agency, 9 ed., § 211.

¹⁷ The corporation may ratify by act or conduct. Kelley v. Newburyport R. R., 141 Mass. 496.

¹⁸ Munson v. Syracuse, etc., R. R., 103 N. Y. 58; Aberdeen Ry. v. Blakie, 1 Macq. 461.

¹⁹ Miner v. Ice Co., 93 Mich. 97.

²⁰ 1 Mor., Priv. Corp., § 527; 3 Clark & Marshall, Priv. Corp., § 761 c.

²¹ Mullanphy Bank v. Schott, 135 Ill. 655; Garrett v. Burlington Co., 70 Ia. 699.

obtaining judgment may levy execution.²² The majority of courts are therefore but logical in granting him the right of further protecting himself by buying in at the foreclosure or execution sale. The common statement that a director cannot create relations antagonistic to the interests of the corporation, would seem too broad a generalization.

ESTOPPEL OF A CESTUI QUE TRUST BY THE TRUSTEE'S MISREPRESENTATION. — That an equitable mortgagee of realty is not always safe in relying on the apparent regularity of title-deeds, is shown by a recent English case. *Capell v. Winter*, [1907] 2 Ch. 376. A trustee with power of sale gave a deed of trust property containing a recital of full payment of the purchase price, as security for a personal debt. The creditor, with notice of the trust, deposited the deed by way of equitable mortgage with the defendant, who had no notice of the trust or of non-payment. The court decided that the equities of the beneficiaries of the trust and of the equitable mortgagee were equal in other respects and that the equity of the beneficiaries, being prior in time, prevailed. It is clear that if a trustee retains the legal title, he cannot by a breach of trust create an equity in a third person superior to that of the *cestui que trust*.¹ For there the claim of the *cestui* is directly against the fraudulent trustee and, having been guilty of no misconduct himself, he can assert his beneficial ownership. But if a *cestui que trust* or other equitable claimant, by word or conduct, causes the belief that the trustee is the sole beneficial owner, he will be deferred to a subsequent equitable encumbrancer who has acted on the faith of such misrepresentation.²

It has been held that where a vendor delivers a deed containing a false receipt for the purchase money,³ an equitable mortgagee who makes advances relying on the misstatement has a claim superior to the vendor's lien.⁴ The law of agency supplies an analogous principle.⁵ And where the vendor was a trustee with power of sale the equitable mortgagee was likewise protected,⁶ on the ground that a claim on a third party — the vendee — superior to that of the trustee is also superior to that of the *cestui*, who must establish his rights through the trustee. The present case seems indistinguishable on principle: in both a trustee executed a conveyance with a fraudulent receipt of the purchase money; in both a third party was induced by this false statement of fact to advance money to the grantee. The court here declares the principles of the former decisions to be confined to cases of vendors' liens, and so inapplicable where a *prima facie* sale is made to conceal a mortgage, and expressly denies that the true basis is estoppel. There seems, however, little difference in saying that the equitable mortgagee is protected because he relied on a misrepresentation of fact, as stated in the earlier cases, and that the *cestui* is estopped from asserting a claim

²² *Deane v. Hodge*, 35 Minn. 146; *Rollins v. Shaver Co.*, 80 Ia. 380.

¹ *Shropshire Ry. Co. v. The Queen*, L. R. 7 H. L. 496 (an equitable mortgage of stock).

² *Rice v. Rice*, 2 Drew. 73.

³ This is by statute sufficient evidence of payment in favor of a subsequent purchaser. 44 & 45 VICT., c. 41, §§ 54, 55.

⁴ *Bickerton v. Walker*, 31 Ch. D. 151. See *In re Castell*, [1898] 1 Ch. 315.

⁵ *Brockelsby v. Building Society*, [1895] A. C. 173.

⁶ *Lloyds Bank, Ltd. v. Bullock*, [1896] 2 Ch. 192.

superior to that of one who has been deceived by the trustee. The nature and foundation of the defense, then, is true estoppel,¹ and therefore the absence of a vendor's lien is immaterial; the trustee is estopped not only from showing that the purchase money had not been paid, but also that the transaction was not in fact a sale, as it purported to be. And since the trustee's right of action is barred, the *cestui's* is also barred.² It is submitted, therefore, that the present decision is unfortunate in its effects as giving further grounds of insecurity to equitable mortgagees, and indefensible in principle.

EQUITY JURISDICTION AS TO PERSONAL RIGHTS. — It is often stated that the province of chancery is to protect only property rights,³ by which it is meant that the courts will not entertain bills alleging injury to personal rights — to life, limb, or reputation — or to status. Perhaps this doctrine originated in the fact that the chancellor was first called on to interfere when the law of real property was changing with the decay of feudalism, and later when the modern commercial law was coming into being; and since the growth of the new practice was regarded with hostility by the common law, which was particularly well developed as to personal rights, it was natural that there should be a tendency to hedge and to limit equity's field.⁴ In a recent New Jersey case the court enjoined the use as evidence of a fraudulent birth certificate and ordered it cancelled on the records, but, while finding a technical property right threatened,⁵ clearly intimated that an individual has rights other than property rights, which he can enforce in a court of equity, and that even without the threatened injury to property rights the complainant was entitled to relief. *Vanderbilt v. Mitchell*, 67 Atl. 97 (Ct. Err. and App.).

A tendency to enlarge the jurisdiction of chancery in the direction thus indicated has steadily been manifesting itself. Protection has been given the relative of a dead man against the removal of his body, the court expressly stating that no true property right was involved.⁶ A right of privacy has also been recognized,⁷ and that not to have private sketches⁸ or "non-literary" letters⁹ made public. The courts have sometimes based their decisions on the ground of a breach of confidence¹⁰ and sometimes on that of an injury to a property right in the letters,¹¹ but it would seem that in neither case do they give the real reason. That they will forbid the breach of confidence committed in making public the letters or pictures means no more than that they recognize the right to keep them private, the real motive for their acting being to prevent the complainant from experiencing unpleasant notoriety; in the other instance, it is clear that they are not so

¹ See *Rimmer v. Webster*, [1902] 2 Ch. 163 (approving *Rice v. Rice*, *supra*, as "pure estoppel").

² Cf. *Ex parte Dale*, Buck 365.

³ See *In re Sawyer*, 124 U. S. 200, 210; 1 Pom., Eq. Jurisp., 3 ed., 104, 123.

⁴ Cf. *Pomeroy*, *ibid.*, 104.

⁵ *Walter v. Ashton*, [1902] 2 Ch. 282; *Meyer v. Phillips*, 97 N. Y. 485. (Relief granted on a threatened invasion of property rights.)

⁶ *Pierce v. Proprietors of Swan Point Cemetery*, 10 R. I. 227.

⁷ *Pavesich v. New England Life Insurance Co.*, 122 Ga. 190. *Contra*, *Roberson v. Rochester Folding Box Co.*, 171 N. Y. 538 (abrogated by N. Y. Laws, 1903, c. 132).

⁸ HARV. L. REV. 193; cf. 15 *ibid.* 227.

⁹ *Prince Albert v. Strange*, 1 Macn. & G. 25.

¹⁰ *Woolsey v. Iudd*, 4 Duer (N. Y.) 379, *Gee v. Pritchard*, 2 Swanst. 402.

much moving to protect any ownership in the ideas expressed as to defend the complainant from the public gaze. The same reasoning would apply in the privacy cases, where also a technical property right is found.⁸

There seems to be no reason in principle against the tendency of these cases. Assuming it to be established that the chancery formerly concerned itself only with questions involving property rights, it has been sometimes argued that equity has become an inelastic science like the law,⁹ and that therefore relief can not be given in cases for which there are no precedents. But modern conditions offer no peculiar reason for denying the chancellor his old function of supplementing the law,¹⁰ and it would seem also that there is no unique quality in rights of status or in personal rights to exclude them from his protection. It seems clear, then, that the technical property rights invoked by the courts as a foundation for their taking jurisdiction are immaterial and should be discarded.

RECENT CASES.

ADMIRALTY — DECREES — CHANGE IN TITLE IN CONDEMNED PRIZE. — The plaintiff sued on a policy of marine insurance for loss of his ship by perils of the sea. The ship was captured during the Russo-Japanese war by a Japanese cruiser, but was wrecked on the Japanese coast before reaching port. Subsequently the wreck was condemned as a prize by a court of competent jurisdiction. *Held*, that the insured cannot recover, since the captor's title dates from the capture. *Andersen v. Marten*, [1907] 2 K. B. 248.

It has been a much vexed question at what time the property in a prize vests in the captor or his sovereign; whether at the moment of capture, or after retention of possession for a day and a night, or after the ship is brought *infra præsidia*. See *Goss v. Withers*, 2 Burr. 683. But by the modern maritime law it is the sentence of condemnation which passes title. *The Peterhoff*, Blatchf. Prize Cas. (U. S.) 620. It would seem therefore that the ship was lost by a peril of the sea while still the property of the insured, and that he should be entitled to recover on the policy. The court, however, denied recovery on the ground that the title of the captors related back to the time of the capture. The only authority for this doctrine is a case in which it was applied to validate the assignment of the captor's interest in the prize before condemnation. *Morrrough v. Comyns*, 1 Wils. K. B. 211. This application of the fiction of relation of title is novel and seems not to be demanded by any considerations of justice or policy.

BILLS AND NOTES — DEFENSES — TIME GIVEN PRINCIPAL JOINT MAKER. — A negotiable promissory note was signed, without consideration, by one Lyons, with the word "surety" added. An extension was granted the other signer without Lyons' knowledge or consent, and the latter claimed to be discharged. *Held*, that the Negotiable Instruments Law changed the former law, and that he is still liable. *Cellers v. Meachem*, 89 Pac. 426 (Ore.).

For the discussion of a similar case in Maryland, see 20 HARV. L. REV. 646.

CONFLICT OF LAWS — CAPACITY — LAW DETERMINING CAPACITY OF MARRIED WOMAN TO CONTRACT. — A married woman promised to pay rent on a lease of two residences in New Orleans made to her while in Louisiana,

⁸ See 4 HARV. L. REV. 193, 203, 210.

⁹ See *Johnson v. Crook*, 12 Ch. D. 639, 649.

¹⁰ See *Wallworth v. Holt*, 4 Myl. & C. 619, 635; *Green Island Ice Co. v. Norton*, 105 N. Y. App. Div. 331, 332; *Callender v. Callender*, 53 How. Pr. (N. Y.) 364, 365.

where she was incapable by the laws of that state, although capable by those of her domicile. *Held*, that she is bound by her promise. *Freret v. Taylor*, 44 So. 26 (La.).

There is great conflict on whether the law of the domicile or the law of the place of making should prevail as to capacity to make simple commercial contracts. The prevailing rule in the United States seems to hold void those of married women when they are incapable by the law of the place of making. *Nichols, etc., Co. v. Marshall*, 108 Ia. 518. England and the Continental nations take an opposite view. *Guepratte v. Young*, 4 De G. & Sm. 217; STORY, CONF. OF LAWS, 7 ed., 65. By the weight of divided authority she is liable when capable by the law of the place of making. *Milliken v. Pratt*, 125 Mass. 374; *Bell v. Packard*, 69 Me. 105; *contra*, *First Nat'l Bank v. Shaw*, 109 Tenn. 237. Considering the immense amount of business done by non-residents in our states, it would seem that the better rule as to simple commercial contracts is to follow the law of the place of making, rather than to throw on business men the burden of finding out the law of their promisors' domicile. Furthermore, the case under discussion concerns realty; and contracts of this sort seem usually to be governed by the law of the place where the land is situated, rather than by that of either the domicile or the place of making. *Swank v. Hufnagle*, 111 Ind. 453.

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — LEGISLATIVE REGULATION OF GAS RATES. — In a suit by a gas company to recover the price of gas furnished to the city of New York, the city set up the defense that the price was unreasonable, although less than the maximum rate fixed by the legislature. *Held*, that the statutory fixing of a maximum rate is equivalent to express legislative authority to charge up to that rate; and that no constitutional right of the consumer is thereby impaired even though the legislative rate is unreasonably high. *Brooklyn Union Gas Co. v. The City of New York*, 188 N. Y. 334.

For a discussion of the case in the lower court, see 20 HARV. L. REV. 69.

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — RAILROAD TO FURNISH PARTICULAR SERVICE. — In order to make an important connection with another road, the Corporation Commission of North Carolina ordered a railroad to operate a particular passenger train. It appeared that this train could only be operated at a loss, but that the carrier would still be able to make a profit on its intra-state business. *Held*, that such an order does not deny to the carrier equal protection of the laws or due process of law. *The Atlantic Coast Line R. R. Co. v. The North Carolina Corporation Commission*, 206 U. S. 1. See NOTES, p. 49.

CONSTITUTIONAL LAW — PERSONAL RIGHTS — FREEDOM TO CONTRACT. — A statute made it unlawful for an employer to issue to an employee for labor performed any ticket, check, or writing redeemable in goods or merchandise. *Held*, that the statute is unconstitutional. *Jordan v. State*, 103 S. W. 633 (Tex., Ct. Crim. App.).

For a discussion of the principles involved, see 19 HARV. L. REV. 62.

CONSTITUTIONAL LAW — POWERS GRANTED TO CONGRESS AND TO THE FEDERAL JUDICIARY. — Kansas filed a bill in the United States Supreme Court to restrain Colorado from using the waters of the Arkansas River for irrigation purposes. The United States sought to intervene on the ground that Congress had power to regulate the matter by legislation. *Held*, that the Supreme Court has jurisdiction, and that the United States has no right to intervene. *Kansas v. Colorado*, 206 U. S. 46. See NOTES, p. 47.

CORPORATIONS — DIRECTORS AND OTHER OFFICERS — DIRECTOR'S RIGHT TO BUY CORPORATION'S PROPERTY AT EXECUTION SALE. — The defendant loaned money to a corporation of which he was a director. Upon failure of the corporation to repay, he brought suit and recovered judgment. At the execution sale he bought in the property. The plaintiff, a stockholder in the corporation, filed a bill to have the defendant declared a trustee. *Held*, that in

the absence of unconscionable conduct on the part of the defendant, the sale will not be disturbed. *Marr v. Marr*, 66 Atl. 182 (N. J., Ct. of Ch.). See NOTES, p. 51.

CORPORATIONS — ULTRA VIRES — ASSIGNMENT OF FRANCHISE TO AN INDIVIDUAL. — The defendant corporation was empowered to maintain electric wire conduits in the streets of New York City, and was required by statute to furnish space in such conduits for the use of any corporation having the right to transmit electricity. The A company voluntarily assigned its franchise embracing this right to B, an individual, from whom it passed to the plaintiff corporation. *Held*, that the plaintiff may compel the defendant to allow it space in its conduits. *Matter of Long Acre, etc., Co.*, 188 N. Y. 361.

A New York corporation, such as the A company, may assign its franchise to another corporation. N. Y. Laws, 1893, c. 638. No provision is made, however, for an assignment to an individual, and, apart from express authorization, such an assignment by a public service corporation is *ultra vires*. *Stewart's Appeal*, 56 Pa. St. 413. By the better view, however, it does not necessarily follow that the transfer is of no effect; the transfer has in fact been made and the title passed. *Bank v. Whitney*, 103 U. S. 99. This reasoning was the basis of the decision in the present case. The facts, however, present a problem somewhat different from the ordinary cases of *ultra vires* transfers. The plaintiff would have been a competent grantee of the franchise had the transfer been made without the intervention of B. But where a *de facto* corporation is the only weak link in the chain of title the position of the ultimate grantee is not prejudiced. See 20 HARV. L. REV. 457. Applying this analogy to the present case, the result reached by the court seems correct. *Cf. Parker v. Elmira, etc., Co.*, 165 N. Y. 274.

DANGEROUS PREMISES — LIABILITY TO TRESPASSERS — CHILD TRESPASSER ON TURNTABLE. — The plaintiff, a boy of four or five years, entered the defendant's premises through a gap in its boundary hedge. While playing with companions on the defendant's turntable, which was not fastened, the plaintiff was injured. The jury found that the hedge was in a defective condition through the defendant's negligence. *Held*, that the defendant is not liable. *Cooke v. Midland Great Western Railway*, 41 Ir. L. T. R. 157 (Ir., Ct. App., June 14, 1907).

American rulings tend to deny the liability of a landowner to a child trespasser who has been injured through the condition of the premises, except in the so-called turntable cases, where the weight of authority seems to allow recovery. See 11 HARV. L. REV. 349, 434; 12 *ibid.*, 206. The principal case, it is believed, marks the first appearance of a turntable case in the English courts. The court finds that the defendant owes to the trespassing child no duty of care in respect to the condition of either the hedge or the turntable, and distinctly repudiates the fiction of "implied invitation" or "allurement." This decision seems in line with the reluctance of the courts to impose further restraints on a landowner's use of his land, and with the tendency of the English courts to treat a child trespasser the same as an adult.

DEEDS — PARTIES — GRANTOR AND GRANTEE SAME PERSON. — One M granted land to herself and three others. *Held*, that the grantor has a one-fourth undivided interest in the land. *Green v. Cannady*, 57 S. E. 832 (S. C.).

It is clear that a grantee is incapable of taking under his own deed, since two parties are as necessary to a deed as to a contract. And a grant by A to A, B, and C in trust has been held ineffective as to A, and to vest the entire legal estate in B and C. *Cameron v. Steves*, 9 N. Brunsw. 141. In that case, however, the grant, by express statutory provision, created a joint tenancy. Therefore, upon familiar principles of joint tenancy, B and C properly took the entire title, and since A was incapable of taking under his own deed, their interest was not subject to any right in him. See SHEP. TOUCH., 82. But in the present case the deed was construed as creating a tenancy in common, hence it purported to pass only one-fourth of the estate to each of the grantees. Con-

sequently, on the basis that a deed to the grantor is inoperative, there has been no conveyance of one-fourth of the estate, and the result reached by the court is correct.

EQUITY — JURISDICTION — CANCELLATION OF FRAUDULENT BIRTH CERTIFICATE. — *Held*, that equity has jurisdiction to perpetually enjoin the use as evidence of a fraudulent birth certificate, and to order such certificate to be cancelled. *Vanderbilt v. Mitchell*, 67 Atl. 97 (N. J., Ct. Err. and App.). See NOTES, p. 54.

HIGHWAYS — ADDITIONAL SERVITUDES — INTERURBAN ELECTRIC RAILROADS. — The defendant railway company operated a large number of passenger and freight trains daily over a T rail, double track line on a city street. Trains composed of heavy railroad cars were run over this line to surrounding towns at a high rate of speed and with few stops. The plaintiff, an abutting owner of the fee of the street, sued for compensation. *Held*, that he cannot recover. *Kinsey v. Union Traction Co.*, 81 N. E. 922 (Ind., Sup. Ct.).

A new use of the public easement over highways is an additional servitude, for which the abutting owners are entitled to compensation, if it is not within the general purpose for which the easement was created. *Schaaf v. Railway Co.*, 66 Oh. St. 215. A street railway is within that purpose. *Atty.-General v. Metropolitan Railroad Co.*, 125 Mass. 515. But a steam commercial railroad is not. *Bond v. Pennsylvania Co.*, 171 Ill. 508. Although there is much controversy as to an interurban electric road, the weight of authority is that if it carries freight it is an additional servitude. *Linden Land Co. v. Milwaukee Ry. Co.*, 107 Wis. 493. This view is adopted by the dissenting judges in the principal case, who point out that the road only differs from a steam commercial railroad in its motive power. User, however, and not motive power, is the proper test. *William v. City Electric St. Ry. Co.*, 41 Fed. 556. It is difficult to reconcile the decision with the authorities, but there has been a gradual development in this branch of the law in recent years recognizing the modern tendency to permit a more extensive use of highways than was originally intended, so that the case seems merely a further step in advance.

ILLEGAL CONTRACTS — CONTRACTS AGAINST PUBLIC POLICY — PROMISE TO MARRY AFTER DEATH OF EXISTING WIFE. — The defendant promised to marry the plaintiff after the death of his wife, the plaintiff knowing at the time that he then had a wife. *Held*, that the contract is not void as against public policy. *Wilson v. Carnley*, 23 T. L. R. 757 (Eng., K. B. Div., July 31, 1907).

If a plaintiff was honestly unaware of defendant's existing marriage, that marriage is, of course, no defense to an action for breach of promise. *Wild v. Harris*, 7 C. B. 999; *Kelley v. Riley*, 106 Mass. 339. But where the plaintiff was not innocent, American courts have held that contracts looking to future marriage are immoral and give no legal rights. *Paddock v. Robinson*, 63 Ill. 99; *Noice v. Brown*, 38 N. J. L. 228. A dictum by Baron Pollock was the basis for these decisions. See *Millward v. Littlewood*, 5 Exch. 775. Contingencies are possible where an engagement before the death of a first wife might be upheld, for example, if made at her request, or after her insanity; but an arrangement of the kind made in the present case manifestly tends to immorality, and American law properly denotes these contracts as *contra bonos mores*. The contrary conclusion drawn by the English court appears to be due to the modern sentiment that it is impolitic to extend the classes of contracts which courts may refuse to enforce merely because the transactions they contemplate seem opposed to the public welfare.

INNKEEPERS — DUTY TO GUESTS — LIABILITY OF INNKEEPER FOR INSULT TO GUEST. — The plaintiff was a guest at the defendant's hotel. At night one of the employees of the hotel, by order of the defendant, forcibly entered the plaintiff's room, used insulting language, and threatened to turn her out as a disreputable woman. *Held*, that the defendant is not liable. *DeWolf v. Ford*, 104 N. Y. Supp. 876 (App. Div.).

Following the analogy of the liability of a carrier to its passengers for the torts of its servants on the basis of an implied contract to afford protection, an innkeeper has been held liable to his guest for the unauthorized tort of his servant. *Clancy v. Barker*, 71 Neb. 83; see 17 HARV. L. REV. 575. This case, however, presents the additional feature that no tort was committed, since only the plaintiff's personal feelings were injured. Such injury is not in general an actionable wrong. *Reed v. Maley*, 115 Ky. 816. But the implied contract of the carrier is extended so that it is liable to its passengers for mental suffering caused by the insults of its servants. *Gillespie v. Brooklyn Heights Ry. Co.*, 178 N. Y. 347. To follow the analogy of the carrier logically, the present defendant should be held liable, even though the act of his employee did not constitute a tort. And the analogy seems sufficiently close to sustain this extension. Both the carrier and the innkeeper are engaged in a public service, and their liabilities are based upon the same considerations of public policy.

INTERSTATE COMMERCE — CONTROL BY STATES — GARNISHMENT OF A CARRIER ENGAGED IN AN INTERSTATE SHIPMENT. — The plaintiff garnished a carrier in Georgia on account of the possession of a car of the defendant which was being used in shipping freight from another state into Georgia, and was intrusted to the garnishee under the usual agreement for forwarding the car and returning it on another shipment. *Semble*, that the garnishment would not be an unconstitutional interference with interstate commerce. *Southern, etc., Co. v. Northern Pac. Ry. Co.*, 127 Ga. 626.

Upon this point the case is the first to disagree with a number of contrary holdings criticized in 20 HARV. L. REV. 319.

INTERSTATE COMMERCE — INTERSTATE COMMERCE COMMISSION — RECOVERY OF UNREASONABLE RATE BY SHIPPER. — The Interstate Commerce Commission declared a rate unreasonable and ordered a new rate. The plaintiff, a shipper, applied for restitution of the difference between the rate charged and that established by the Commission. *Held*, that he can recover. *Southern Ry. Co. v. Tift*, 206 U. S. 428.

It has been held that a shipper has no remedy in the courts until the Interstate Commerce Commission has passed on the reasonableness of a rate. *Texas, etc., Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426. See 20 HARV. L. REV. 576. But this is only a matter of procedure, not affecting the shipper's ultimate right not to be overcharged, if when a rate is declared unreasonable he can recover the excess previously paid. The court also, by dicta, limits the application of this rule of procedure to actions at law for damages, declaring that the Interstate Commerce Act leaves unimpaired the jurisdiction of a court of equity to restrain the enforcement of unreasonable rates.

INTERSTATE COMMERCE — WHAT CONSTITUTES INTERSTATE COMMERCE — COMMERCE WITH NAVY YARDS UNDER EXCLUSIVE FEDERAL JURISDICTION. — A Virginia statute imposed a penalty on telegraph companies for failure to deliver messages. The defendant company failed to deliver a message sent from a point within the state to the plaintiff in the Norfolk Navy Yard, which was under the exclusive jurisdiction of the federal government. *Held*, that the Commerce Clause of the Constitution gives Congress no authority over this message such as to render the state statute inapplicable. *Western Union Telegraph Company v. Chiles*, 57 S. E. 587 (Va.).

The Commerce Clause, in regard to commerce "among the states," has been regarded as giving Congress exclusive jurisdiction only over commerce which concerns more than one state. See *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1. Yet it has been held that an act of the Legislative Assembly of the District of Columbia imposing a license on drummers is indistinguishable, as regards the Commerce Clause, from a similar state act, and therefore is void so far as applied to those soliciting for individuals outside the District. *Stoutenburgh v. Hennick*, 129 U. S. 141. The authority of Congress over places purchased by the consent of the legislature of a state for dockyards, etc., is like its author-

ity over the District of Columbia. *U. S. v. Cornell*, 2 Mason (U. S. C. C.) 60. Whether there is a difference, as regards commerce, between the District and land under the exclusive control of the federal government used for dock-yards, etc., has not been considered. On principle there is no ground for such a distinction. The case follows a dissenting opinion of Miller, J., holding that commerce "among the states" is commerce between the citizens of one state and those of another state. See *Stoutenburgh v. Hennick*, *supra*.

LANDLORD AND TENANT — CONDITIONS AND COVENANTS IN LEASES — COVENANT AGAINST ASSIGNMENT. — A lease contained a covenant against assignment by the lessee or others having his estate in the premises. The lessee devised his interest to his executors upon certain trusts, and they transferred the estate to themselves as trustees. *Held*, that there is no breach of the covenant. *Squire v. Learned*, 81 N. E. 880 (Mass.).

Two views are possible as to the scope of a covenant against assignment. One is that only an alienation *inter vivos* by the lessee is forbidden; the other, that the covenant also forbids testamentary disposition. An early case took the distinction that, while in general a devise is a breach, it is permitted if the devisee be named executor. *Windsor v. Barry*, Dyer 45 b, note. This seems erroneous, since the executor as devisee is as distinct as any stranger from the executor as such. The only justification for the present decision must lie in the proposition that a devise of the leasehold estate is not a breach of a covenant not to assign. *Fox v. Swann*, Styles 482; *contra*, *Barry v. Stanton*, Cro. Eliz. 330. It is no breach for the lessee's administrator to transfer the estate to the next of kin, or to sell it as assets. *Seers v. Hind*, 1 Ves. Jr. 294. Hence it would seem that a true construction of the covenant should likewise allow a testamentary disposition by the lessee. The object of the covenant is to keep the term out of objectionable hands; and this purpose is as likely to be defeated if the lessee dies intestate as if he directs to whom it shall pass at his death.

LEGACIES AND DEVISES — ABATEMENT — LEGACY IN SATISFACTION OF A DEBT. — The testator bequeathed £3,000 to the trustees of his daughter's marriage settlement in satisfaction of his covenant to pay them £1,000. *Held*, that the legacy abated equally with other general legacies. *In re Wedmore*, [1907] 2 Ch. 277.

Priority of one general legacy over another is not allowed without clear proof that such was the testator's intention. *Appeal of the Trustees*, 97 Pa. St. 187. But a legacy sustained by valuable consideration is favored on the principle that the legatee is a purchaser for value. *Blower v. Morret*, 2 Ves. 420; *Reynolds v. Reynolds*, 27 R. I. 520. This seems correct when a bequest is made in satisfaction of an unliquidated claim against the testator's estate, for any excess of the legacy over the actual value of the claim is compensation to the creditor for waiving his chance of recovering a greater sum by litigation. See *Borden v. Jenks*, 140 Mass. 562, 564. This consideration does not apply, however, where the legatee's claim was already liquidated, since the creditor then runs no risk of loss by accepting the legacy instead of suing for his debt. There is then no basis for a conclusion that the legacy, at least any sum in excess of the testator's liability, was intended to be paid before bequests to volunteers, and the principal case seems correct. If, however, the legacy abates below the value of his claim, the legatee may waive it and recover as a creditor. See *Collins v. Cloyd*, 29 S. W. 735 (Ky.).

LIBEL AND SLANDER — ACTS AND WORDS ACTIONABLE — SUIT BY CORPORATION. — The defendants published an article which stated that an officer of the plaintiff corporation was an ex-criminal and "a tout sleek enough in his methods to have corralled bankers and brokers of unimpeachable legitimacy as clients for the New York Bureau of Information." *Held*, that the article is a libel *per se* for which the plaintiff may recover. *New York Bureau of Information v. Ridgway-Thayer Company*, 104 N. Y. Supp. 202 (App. Div.).

While the tendency of modern adjudication is to treat corporations as natural persons, the courts have not recognized that a corporation has a personal character independent of its trade or business. *Trenton, etc., Ins. Co. v. Perrine*, 23 N. J. L. 402. A corporation has been refused recovery for an injury to its reputation by a false accusation of corrupt practices. *Mayor, etc., of Manchester v. Williams*, [1891] 1 Q. B. 94. But a corporation has a business character, and it is well settled that it may recover for libel without proof of special damage where its business reputation is concerned. *Metropolitan, etc., Co. v. Hawkins*, 4 H. & N. 87; *Union Assoc. Press v. Heath*, 49 N. Y. App. Div. 249. It has also been held that a corporation cannot maintain an action for slander when the words were spoken of one of its officers, if the slander be not in direct relation to the business of the corporation. *Brayton v. Cleveland, etc., Co.*, 63 Oh. St. 83; see 14 HARV. L. REV. 289. But in the present case the defamation does relate to the business of the corporation. Moreover the inference is that the officer's connection with the company still continues. Consequently the article directly concerns the present business reputation of the plaintiff, and the result reached seems correct.

MORTGAGES — FORECLOSURE — MORTGAGOR'S RIGHT TO SURPLUS IN HANDS OF FIRST MORTGAGEE. — After a foreclosure sale the representative of the deceased mortgagor sued the first mortgagee, who had notice of the rights of the second mortgagee, to recover the surplus. *Held*, that the plaintiff may recover. *Noar v. Bosse*, Sup. Ct. of Hawaii, June 20, 1907.

The decision is in accord with the existing authorities. *American Mortgage Co. v. Inzer*, 98 Ala. 608; *Itasca Investment Co. v. Dean*, 84 Minn. 388. Nevertheless it cannot be supported on principle. At common law the second mortgagee becomes entitled to the rights remaining in the mortgagor after making the first mortgage. One of these rights is that of receiving from the first mortgagee any surplus from the sale of the mortgaged premises. *Buttrick v. Wentworth*, 88 Mass. 79. It has been held that if the surplus is paid the mortgagor after notice of the claim of the second mortgagee, the person making such payment is still liable to the second mortgagee. *Fuller v. Langum*, 37 Minn. 74. Since the mortgagor has assigned his rights to the second mortgagee, it is difficult to see on what grounds he can base his claim against the first mortgagee, who is bound to hold the surplus for the second mortgagee if he has notice of the latter's claim. Furthermore, the surplus is what remains to secure the mortgagor's debt to the second mortgagee. To allow the mortgagor to recover, therefore, is to allow a debtor to recover his security without payment.

PLEDGES — TRANSFER OF POSSESSION — GOODS STORED ON PLEDGOR'S PREMISES. — A warehouse company of New York obtained floor-room in a knitting company's mills in Wisconsin by a nominal lease. The place was used, not as a public storehouse, but solely to store property of the knitting company. The keys of this storage-room were kept by employees of the knitting company, and the articles stored were changed without the warehouse company's knowledge. The storage receipts given for such property were transferred to several parties as security for loans. Upon the bankruptcy of the knitting company, their trustee in bankruptcy took possession of the property represented by the receipts. *Held*, that there is no pledge of the property such as to bind the trustee in bankruptcy. *Security Warehousing Company v. Hand*, 206 U. S. 415.

The law concerning the necessity of delivery for a valid pledge is in a somewhat unsettled state. Since bailment is essential to any valid pledge, it is a violation of legal principles to leave the pledgor in control, for the anomalous condition then arises that the same person is both bailor and bailee. See 14 HARV. L. REV. 303. A pledge without sufficient delivery may give the pledgee rights when the question lies solely between pledgor and pledgee. See *Adams v. Merchants Nat'l Bank*, 2 Fed. 174. But the rights of other creditors of the pledgor, even as represented by trustees in bankruptcy, should never be prejudiced by enforcing a pledge where the delivery was incomplete.

Young v. Kimball, 59 N. H. 446; *contra*, *Macomber v. Parker*, 14 Pick. (Mass.) 497. Delivery to third persons as agents of the pledgee is universally held to create a lien for the pledgee; and this rule has been applied even when such agent was the pledgor's employee. *Sumner v. Hamlet*, 12 Pick. (Mass.) 76. The principal case properly refused to allow an extension of this doctrine which would permit nominal possession by an employee to be a shield for actual control by the pledgor, enabling him fraudulently to obtain additional credit upon encumbered assets.

POLICE POWER—REGULATION OF BUSINESS AND OCCUPATIONS—PROHIBITION OF NIGHT WORK BY WOMEN IN FACTORIES.—A New York statute provided that no female should be employed or permitted to work in any factory before six o'clock in the morning or after nine o'clock in the evening. *Held*, that the statute is unconstitutional. *People v. Williams*, 189 N. Y. 131.

This decision affirms the decision of the lower court, commented upon in 20 HARV. L. REV. 653.

POLICE POWER—REGULATION OF PROPERTY AND USE THEREOF—STATUTE INVALIDATING LICENSE CONTRACTS OF PATENTEES.—Proposed legislation declared criminal and void the sale or rental of tools or machinery on terms which forbade the vendee or lessee to obtain another article for the same operation, or for other steps in the same process, or materials to be used in the process, from any other than the vendor or lessor. *Held*, that the application of such legislation to the sale or rental of patented articles is constitutional. *Opinion of the Justices*, 193 Mass. 604.

The right of a patentee to dictate the terms on which the patented article may be used by a public service company, is subject to state legislation regulating such companies. *State v. Bell Tel. Co.*, 36 Oh. St. 296; *contra*, *Am. Rapid Tel. Co. v. Conn. Tel. Co.*, 49 Conn. 352. The application of state legislation prohibiting monopolistic contracts to restrictions imposed by a patentee upon his licensee appears to be without precedent, but not unconstitutional as infringing on federal authority. For the secondary monopolies contemplated by the prohibited contracts are not logically incident to the principal monopoly and within the protection of the federal grant. *Contra*, *Heaton-Peninsular, etc., Co. v. Eureka, etc., Co.*, 77 Fed. 288. But legislative interference with contracts must be clearly for the public welfare. *Commonwealth v. Strauss*, 191 Mass. 545. License-contracts more or less similar to those in question, have been held not to be opposed to public policy, or within the intended scope of federal anti-trust laws. *Bement v. Nat'l Harrow Co.*, 186 U. S. 70; *U. S., etc., Co. v. Griffin, etc., Co.*, 126 Fed. 364. Moreover, the practical benefit of prohibiting the secondary monopolies would be confined to a few rival manufacturers, since the patentee would still control the price of the principal article. This application of the proposed legislation does not clearly advance the public welfare, and therefore is a doubtful exercise of the police power.

PUBLIC SERVICE COMPANIES—RIGHTS AND DUTIES—EXCLUSIVE CONTRACT.—The defendant, a hotel-keeper, contracted with the plaintiff telephone and telegraph company that it should have an exclusive right to install telephones in the hotel. *Held*, that the contract is void. *Central N. Y. Telephone & Telegraph Co. v. Averill*, 105 N. Y. Supp. 378 (Sup. Ct.).

The reasoning of the court is that this contract tends to suppress competition so as to threaten the public welfare. The validity of such contracts is said to be based primarily on public policy. *Gibbs v. Consolidated Gas Co.*, 130 N. J. 396. Contracts similar to the one under discussion, when between private individuals who are not competitors, are held valid. *Ferris v. American Brewing Co.*, 155 Ind. 539. But where there is any tendency to stifle competition between parties engaged in a public service, they are void. *W. U. Tel. Co. v. Am. Union Tel. Co.*, 65 Ga. 160. Telephone and telegraph companies are public institutions, deeply involving the public interest, and consequently

the authorities hold any restraint on their service to be against public policy. *Cumberland, etc., Co. v. Morgan's Louisiana, etc., R. R. Co.*, 51 La. Ann. 29. A South Carolina case identical with the present case reached the same result. *Gwynn v. Citizens' Telephone Co.*, 69 S. C. 434. It might well be argued, however, that, had the contract been for a telephone in a private house, the public welfare is not involved, since the contracting party is the only person directly deprived of the benefits of competition. But granting this argument, the present contract might be held void as a violation of an innkeeper's duty to his guests.

RIGHT OF PRIVACY—INFRINGEMENT—UNAUTHORIZED USE OF NAME AND PICTURE FOR PURPOSES OF TRADE.—A famous inventor sought to restrain a drug manufacturer from using his name, picture, and pretended certificate without his consent. *Held*, that the plaintiff, though not a trade competitor, is entitled to relief. *Edison v. Edison Polyform Mfg. Co.*, 67 Atl. 392 (N. J., Ct. of Ch.).

A man has no right of property in his name. *Dockrell v. Dougall*, 80 L. T. Rep. (N. S.) 556. But it has been said that he may invoke equity to protect him from exposure to litigation or liability caused by its unauthorized use. *Walter v. Ashton*, [1902] 2 Ch. 282. Protection has also been granted where the plaintiff's professional reputation is endangered. *Mackenzie v. Soden, etc., Co.*, 27 Abb. N. C. (N. Y.) 402. In the case under discussion, however, the risk of pecuniary loss seems, at the most, shadowy; nor does there clearly appear here any damage to the plaintiff's professional reputation. The relief granted to this plaintiff of world-wide repute, who suffers no actual or prospective damage, must therefore be based on the broad ground of his right to be free from unjustifiable commercial exploitation of his non-corporeal personality. As to the picture, this case turns the scale of American authority in what is probably the right direction. See *Pavesich v. New England, etc., Co.*, 122 Ga. 190; *contra, Roberson v. Rochester, etc., Co.*, 171 N. Y. 538; *Corelli v. Wall*, 22 T. L. R. 532. As to the name and non-libellous misrepresentation, an important advance is marked in the establishment and definition of the right of privacy.

SURETYSHIP—SURETY'S DEFENSES—VARIATION FROM CONTRACT.—By an agreement between the principal and the obligee for a variation in the construction of a two-story building, the cost was increased \$700. The principal defaulted. *Held*, that the surety is not released. *Prescott Nat'l Bank v. Head*, 90 Pac. 328 (Ariz.).

Much of the confusion in the authorities on this question of change of an assured contract has arisen from failure to keep clear the distinction between an alteration of the original document and a mere variation from it. Any alteration or substitution of a new document for the old, whether detrimental to the surety or not, gives him a legal defense. *Ziegler v. Hallahan*, 126 Fed. 788. But if the parties, without the surety's consent, make a parol collateral agreement varying the actual performance of the original contract, the surety's defense, if any, is equitable, since a written contract cannot be varied by a parol agreement. See 16 HARV. L. REV. 511. It follows that the variation must threaten substantial harm to the surety to give him equitable relief. *Dunn v. Parsons*, 40 Hun. (N. Y.) 77. A change in the construction of a building whereby the cost is only slightly increased is not sufficient. *Hohn v. Shideler*, 164 Ind. 242. But it has been held in a similar case that a change in the construction at an increased cost of eighty-eight dollars released the surety. *Fullerton Lumber Co. v. Gates*, 89 Mo. App. 201. In the present case the increase seems substantial and to justify equitable relief, and the decision is opposed to the weight of authority.

TAXATION—WHERE PROPERTY MAY BE TAXED—SITUS OF PROMISSORY NOTES.—A New York creditor loaned large sums to Ohio debtors. The notes evidencing these debts were kept with an agent of the creditor in

Indiana. *Held*, that the notes have not a taxable situs in Indiana. *Buck v. Beach*, 206 U. S. 392. See NOTES, p. 50.

TITLE OWNERSHIP AND POSSESSION — POSSESSION OF CONTENTS OF RECEPTACLE. — After seizure of his goods under a writ of *feri facias* the judgment debtor, without the knowledge of the sheriff, placed a sum of money in a piece of the furniture seized. Shortly afterwards he died insolvent. The sheriff having exercised no control over the money, the official receiver claimed it for the estate. *Held*, that the money has been placed in possession of the sheriff so that he is entitled to it. *Johnson v. Pickering*, [1907] 2 K. B. 437.

To constitute a valid levy on personal property, the American courts are not so strict as the English in demanding actual seizure by the sheriff, yet both agree that the chattel must be reduced to the legal possession of the officer. *Blades v. Arundale*, 1 M. & S. 711; *Minor v. Herriford*, 25 Ill. 344. Possession of a chattel is not necessarily identical with possession of its receptacle. To possess the contents a man must know of its existence, or at least consent to assume control of whatever the receptacle may contain. *Merry v. Green*, 7 M. & W. 623; *Durfee v. Jones*, 11 R. 1. 588. And if the possessor of the receptacle exercises no control over the chattel, possession depends on the intent of the person placing the chattel in the receptacle. *Commonwealth v. Ryan*, 155 Mass. 523. In the principal case it seems difficult to work out possession of the money in the sheriff. He was wholly unaware of its existence, and he certainly did not consent to accept responsibility for everything the debtor might place in the furniture. Furthermore, the debtor placed the money in the receptacle with intent to keep control, and its possession, therefore, remained in him notwithstanding the sheriff's possession of the furniture.

TREASON — RESIDENT ALIEN'S DUTY OF ALLEGIANCE. — The petitioner, a citizen of the South African Republic, was domiciled in Natal. When that portion of Natal had been evacuated by the British army and occupied by the Boer forces for some months, he joined the latter. *Held*, that he is guilty of high treason. *De Jager v. Attorney-General of Natal*, [1907] A. C. 326.

A citizen who renounces his allegiance and joins the enemy during war is guilty of high treason. *Rex v. Lynch*, [1903] 1 K. B. 444. An alien also owes a special allegiance to the state and may be guilty of high treason. See *Carlisle v. United States*, 16 Wall. (U. S.) 147; *Rex v. De la Motte*, 1 East P. C. 53. The present case extends the rule applied to citizens to an alien so long as he remains domiciled, even during his natural sovereign's temporary occupancy of the place of domicile. However strong the decision may appear, there seems no authority for the petitioner's contention that, with the temporary withdrawal of the state's forces, its sovereignty ceases. A belligerent's authority in occupied territory is a manifestation of the stress he puts on his enemy, and the sovereign's rights remain intact. HALL, *INTERNAT. LAW*, 3 ed., 468. Hence it would seem that wrongs done during the foreign occupation are afterwards cognizable by the ordinary courts. Furthermore, the consideration suggested by the court, that an opposite decision would permit aliens to take such an intolerable advantage of the hospitality extended to them as to swell a small invading force to a large army, seems unanswerable.

TRUSTS — RIGHTS AND LIABILITIES OF THIRD PARTIES — CESTUI ESTOPPED BY TRUSTEE'S MISREPRESENTATION. — A trustee with power of sale gave a deed of trust property containing a recital of full payment of the purchase price, as security for a personal debt. The creditor, with notice of the trust, deposited the deed by way of equitable mortgage with the defendant, who had no notice of the trust or of non-payment. *Held*, that the equities of the *cestui qui trust* and the equitable mortgagee are equal in all other respects, and that of the *cestui* being prior in time prevails. *Capell v. Winter*, [1907] 2 Ch. 376. See NOTES, p. 53.

WITNESSES — PRIVILEGED COMMUNICATIONS — WAIVER BY COMMISSION TO TAKE TESTIMONY. — The plaintiff caused a commission to be issued for the examination of her physician. On the defendant's offering the deposition

in evidence the plaintiff objected on the ground that the communication was privileged. *Held*, that the privilege is waived. *Clifford v. Denver & Rio Grande R. R. Co.*, 188 N. Y. 349.

The object of the statutes making communications to a physician privileged unless the privilege is waived by the patient, is "to save the patient from possible humiliation; not to enable him to win a lawsuit." See *Schlotterer v. Brooklyn, etc., Ferry Co.*, 89 N. Y. App. Div. 508. And the better opinion is that where the patient has voluntarily destroyed the privacy of the testimony, he has shown there is no need of the privilege; its object has then been defeated, and therefore he can no longer object. Accordingly waiving the privilege at one trial precludes setting it up at retrial. *Schlotterer v. Brooklyn, etc., Ferry Co.*, *supra*. And the privilege is also lost by the patient presenting evidence of the communication which is ruled incompetent. *Kemp v. Metropolitan St. Ry. Co.*, 94 N. Y. App. Div. 322. Moreover, the similar privilege concerning transactions with an attorney is waived by making a sworn statement of the communication before a justice and publishing it in a newspaper. *In Re Burnette*, 73 Kan. 609. In the present case the communication was revealed, hence the object of the privilege, the preservation of privacy, could not be attained, and the objection was properly overruled. 4 WIGMORE, EVIDENCE, § 2380, *et seq.*

BOOKS AND PERIODICALS.

I. LEADING LEGAL ARTICLES.

TERRITORIAL JURISDICTION IN WIDE BAYS.—The extent to which a littoral state may claim the right of territoriality over its bays was recently considered in two articles. *Territorial Jurisdiction in Wide Bays*, by A. H. Charteris, 16 Yale L. J. 471 (May, 1907); and *The Recent Controversy as to the British Jurisdiction over Foreign Fishermen more than Three Miles from Shore*, by Charles Noble Gregory, 1 Am. Pol. Sci. Rev. 410 (May, 1907). The occasion for this discussion was the holding in a recent Scottish case¹ that a statutory by-law prohibiting trawling in Moray Firth, a triangular sheet of water with an entrance eighty miles wide, applied to foreign fishermen. The decision is right, as the learned authors point out, for though the courts of a state may follow international law in so far as it is the common law of the land, yet the former law, like the latter, may be changed for those courts by a competent act of the legislature. But aside from the local decision there is the broader question whether other nations will recognize this act and whether by such recognition it will become a rule of international policy. Upon this question the articles assemble all the precedents.

In the time of James I, as they point out, by the doctrine of "king's chambers," England asserted jurisdiction over all waters within lines drawn around Britain from headland to headland. In fact, about that time most of the waters surrounding Europe were claimed as the territory of some power. Venice asserted her dominion over the Adriatic, Genoa over the Ligurian Sea, and Sweden and Denmark over the Baltic. Such claims, however, necessarily became more and more untenable, and early in the nineteenth century the freedom of the high seas became a principle of international law.² But this principle has not given us at this time any arbitrary rules as to the territorial rights of a state in its bays or as to what constitutes a bay. Mr. Charteris shows that there is only an increasing tendency to some uniformity. Thus he points out that in 1882 in the North Sea Convention, as between themselves, England,

¹ *Mortensen v. Peters*, 14 Scots. L. T. 227.

² Hall, *Internat. Law*, 5 ed., 140 *et seq.*

Germany, Belgium, Denmark, France, and Holland limited their jurisdiction for the police of fisheries in bays to three miles beyond a line drawn across the bay at the first point nearest the entrance where the width does not exceed ten miles. This rule has also been adopted in the domestic legislation of France, Germany, Belgium, and Holland. And again, that in 1885 in a fisheries convention, Spain and Portugal limited their exclusive fishing rights to bays twelve miles wide at the entrance — a rule also recommended by the Institute of International Law, except in the case of large bodies of water where there has been a continued and well-recognized claim of sovereignty. In applying a rule in specific cases to particular bays the uniformity may not be so clear. Delaware Bay, fifteen miles wide at its mouth, was recognized in 1793 as within the jurisdiction of the United States; in 1885 Chesapeake Bay, twelve miles wide and two hundred miles long, was held not to be part of the high seas; in 1877 Conception Bay, twenty miles wide and fifty miles long, was held to be within the territory of Newfoundland; and Bristol Channel, five to forty-five miles wide and eighty miles long was held in 1859 to be, in part at least, within the territory of Great Britain. On the other hand, the Bay of Fundy, an open arm of the sea, seventy-five miles wide and one hundred and forty miles long, was held a part of the high seas by an umpire in 1853. He said that the word "bay" as applied to this great body of water has the same meaning as that applied to the Bay of Biscay and the Bay of Bengal over which no nation can have the right to assume sovereignty. It must be noted, however, as Mr. Gregory says, that the extreme headland on one side of this bay was within the territory of the United States.

Clearly in the present case, holding a bay in the shape of an eighty-mile equilateral triangle not part of the high seas, we have to face either a change in principle or a greatly extended application of the old rule. To define a principle underlying the cases is not easy. The three-mile limit was based upon the power of a state to control the waters from the shore. The Institute recommends that this limit be extended to six miles. A bay twelve miles wide at the mouth would thus be clearly within the territorial jurisdiction of a state. Even if it were somewhat wider but very long it might still fall within Sir Robert Phillimore's general principle that jurisdiction over bays is limited to those of which the adjoining country has something like physical command. It would require the loosest application of such a rule to cover Moray Firth. Furthermore, such an application should certainly be discouraged because it would encroach on the general benefit to be derived from the freedom of the high seas — a benefit which England herself insisted on in the Behring Sea case. More particularly, as Mr. Gregory says, the adoption of the doctrine of "kings chambers" by other nations would mean that the fishing grounds of the world would pass substantially into local control. It is significant that the loudest protest against such an extension of jurisdiction is shown to have come from the English fishermen.

THE RIGHT OF A PARENT TO THE SERVICES OF HIS CHILD. — There is always a vital interest in law as it touches the individual in his personal relations, and this perhaps is especially true of the law of parent and child. The day of paternal despotism is long past, but many questions as to the law which governs this relation are still unsettled. In a recent article Mr. John A. Ferguson calls attention to a few of these. *Some Doubtful Points Incident to the Relation of Parent and Child*, 4 Comm. L. Rev. 57 (November-December, 1906).

The author first points out the tendency of the courts to regard the performance of the ordinary parental services as mere moral duties imposing no legal obligation on the parent, and cites as an example the rule that a father is not obliged to maintain his child. He then points out the relation of this rule to the right of the parent to the services and earnings of the child, and to the further possibility of recovery by the child of the value of its services. And it is intimated that, since the parent owes no duty to support,

the conception of compensation for maintenance, which is sometimes said to be the basis of the child's duty, is untenable. Also, to show that the father is not legally entitled to the child's services it is cited that a child can make a valid contract of service with its father and therefore, the author suggests, that logically the legal right to the services is in the child, else there would be no consideration for the father's promise. Yet the author weakly concludes that since it would be as reasonable to imply a contract on the part of the child to pay for its maintenance as to imply a contract by the parent to pay for the services, and since recognition of these rights would give rise to embarrassing mutual claims, it is better to say that all service rendered and support received must be referred to natural love and affection. As to the child's right to its earnings, however, the author is not so easily satisfied. He calls attention to the fact that the right of a child to general property is recognized as absolute, and again suggests that a moral obligation in the parent should not beget a legal obligation in the child.

The assumption made that the application of these rules is entirely consistent in America because here a legal duty to support is recognized, is hardly warranted. Here, as in England, legislatures have commonly made it a penal offense to neglect to support minor children, and a few statutes expressly declare it to be the father's duty to support children until they are of age.¹ Under the common law of the nine states which have passed squarely on the question only three seem to have definitely accepted the view that the parent owes a legal duty to support.² Despite this absence of mutuality, however, the right of the parent to the services and earnings of his child is universally recognized. Although it seems never to have been held that a refusal to render services to a parent is a basis for recovering damages against the child's property, the legal right of the father is established by a long list of cases sustaining contracts for children's services made by parents in their own right, and of others permitting fathers or their creditors to recover the earnings of the child from its employer.³ This failure to demand a mutuality of obligation is readily accounted for by the historical development of the law of this relation. The argument that the validity of the contract of service between parent and child shows that the father has not a legal right, is unsound. That right to contract rests on the doctrine of emancipation. The emancipation of a child before majority may be achieved by the mere consent of the parent that the child shall thereafter be its own master,⁴ and such consent may be inferred from the conduct of the parties.⁵ A promise by a father of payment to his child for services to be rendered is very potent evidence of such consent and that the legal right to the services has come to the child. A situation in which the child could reasonably hope to recover from the parent the value of services rendered is, in the absence of such express contract, not likely to arise, for the intent in such situations is usually donative, the *animus contrahendi* being rarely, if ever, present.

ADMIRALTY JURISDICTION OVER MARITIME TREATY RIGHTS. *Anon.* Discussing a recent case denying jurisdiction over a vessel on a river between the United States and Canada. 43 Can. L. J. 345.

ADMISSION TO THE BAR IN NEW YORK. *Frank Sullivan Smith.* Describing the past and present requirements. 16 Yale L. J. 514.

ARMSTRONG COMMITTEE'S LIFE INSURANCE LEGISLATION, MR. SAMUEL B. CLARKE AND THE. *James McKeen.* Answering an article in 41 Am. L. Rev. 161. 41 Am. L. Rev. 321.

¹ 1 Stimson, Am. Statute Law, § 6608.

² *Stanton v. Willson*, 3 Day (Conn.) 37; *Porter v. Powell*, 79 Ia. 151; *Pretzinger v. Pretzinger*, 45 Oh. St. 452. See *Lamson v. Varnum*, 171 Mass. 237; *Weeks v. Merrow*, 40 Me. 151; *Keaton v. Davis*, 18 Ga. 457.

³ See 21 Am. & Eng. Encyc., 2 ed., 1040, 1043.

⁴ *Atwood v. Holcomb*, 39 Conn. 270.

⁵ *Beaver, Bare & Co. v. Bare*, 104 Pa. St. 58.

- BANK ACCOUNTS WITH MINORS. *Thornton Cooke*. Arguing that banks are protected in making such accounts. 24 Banking L. J. 433.
- BEVERIDGE CHILD LABOR BILL AND THE UNITED STATES AS PARENS PATRIAR, THE. *Andrew Alexander Bruce*. Contending that the bill is constitutional. 5 Mich. L. Rev. 627. See 20 HARV. L. REV. 658.
- BILLS OF EXCHANGE AND THE DOCTRINE OF ESTOPPEL. *Anon.* Discussing the possibility of an estoppel against the maker of an overdrawn note. 51 Sol. J. 621.
- BILLS OF LADING IN INTERSTATE COMMERCE. *Thomas B. Paton*. Discussing their present standing and advocating changes. 24 Banking L. J. 371.
- BOYCOTTS, EVOLUTION OF THE LAW RELATING TO. *Robert L. McWilliams*. 41 Am. L. Rev. 336.
- CALVO AND DRAGO DOCTRINES, THE. *Amos S. Hershey*. 1 Am. J. of Int. L. 26.
- CAPITAL PUNISHMENT IN FRANCE, THE ABOLITION OF. *Maynard Shipley*. An historical sketch. 41 Am. L. Rev. 561.
- COMMERCE CLAUSE, THE GROWTH OF THE. *John W. Davis*. Analyzing the extensions attempted in recent acts. 15 Am. Lawyer 171, 213.
- COMMON LAW REMAINDERS, PROFESSOR KALES AND. *Joseph W. Bingham*. 5 Mich. L. Rev. 497. See 20 HARV. L. REV. 243.
- CONSTITUTIONALITY OF FEDERAL LEGISLATION CONCERNING EMPLOYER AND EMPLOYEE ENGAGED IN INTERSTATE AND FOREIGN COMMERCE, THE. *Carl V. Wisner*. Maintaining that the act is constitutional. 5 Mich. L. Rev. 639. See 20 HARV. L. REV. 481, 651.
- CORPORATION PROMISSORY NOTE, WHAT IS A? *Anon.* Carefully collecting the authorities. 24 Banking L. J. 255.
- DRAFT ON A FORGED BILL OF LADING, THE COLLECTION OF A. *Anon.* Discussing the question of the liability of the collecting agency. 24 Banking L. J. 337.
- DOMICIL. *G. Addison Smith*. 32 L. Mag. & Rev. 268.
- DUE PROCESS OF LAW. *Hannis Taylor*. Summarizing the position of the Supreme Court. 41 Am. L. Rev. 354.
- EQUITABLE LIFE ASSURANCE SOCIETY: A POSSIBLE REMEDY TO CANCEL THE STOCK CONTROL. *Robert Rentone Reed*. Comparing the policy holders to *cestuis que trustent*. 19 Green Bag 399.
- EQUITABLE MORTGAGEES, THE POSITION OF. *Anon.* 51 Sol. J. 585. See 21 HARV. L. REV. 53.
- FAIR COMMENT AND QUALIFIED PRIVILEGE. *Norman de H. Rowland*. Maintaining that fair comment is a qualified privilege. 4 Comm. L. Rev. 202. See 20 HARV. L. REV. 152.
- FAIR COMPETITION, THE JUSTIFICATION OF. *Bruce Wyman*. 19 Green Bag 277.
- FOREIGN CORPORATIONS, SUITS BY. *Raymond D. Thurber*. Collecting authorities on the right of non-registered foreign corporations to sue. 9 Bench & Bar 54.
- FOREIGN CORPORATIONS, THE STATUS OF, AND THE LEGISLATURE. II. *E. Hilton Young*. 23 L. Quar. Rev. 290.
- FOURTEENTH AMENDMENT, DEMANDS OF LABOR AND THE. *Roger F. Sturgis*. Arranging the cases upon recent statutes limiting hours, regulating payments, etc. 41 Am. L. Rev. 481.
- IMPUTED CONTRIBUTORY NEGLIGENCE AS APPLIED TO PERSONS SUI JURIS, THE DOCTRINE OF. *John T. Marshall*. Discussing the effect of principles of agency. 64 Cent. L. J. 347.
- INTERNATIONAL ARBITRATION, A PERMANENT TRIBUNAL OF: ITS NECESSITY AND VALUE. *R. Floyd Clarke*. 1 Am. J. of Int. L. 342.
- INTERNATIONAL CONGRESSES AND CONFERENCES OF THE LAST CENTURY AS FORCES WORKING TOWARD THE SOLIDARITY OF THE WORLD, THE. *Simeon E. Baldwin*. 1 Am. J. of Int. L. 565.
- INTERNATIONAL LAW, THE DEVELOPMENT OF. *Richard Olney*. An historical sketch. 1 Am. J. of Int. L. 418.
- INTERNATIONAL UNIONS AND THEIR ADMINISTRATION. *Paul S. Reinsch*. An exhaustive treatise on international conventions for economic and business purposes. 1 Am. J. of Int. L. 579.
- JAPANESE SCHOOL QUESTION AND THE TREATY-MAKING POWER, THE. *Amos S. Hershey*. 1 Am. Pol. Sci. Rev. 393. See 20 HARV. L. REV. 337.
- JAPANESE TREATY AND THE SAN FRANCISCO SCHOOL BOARD RESOLUTION, THE REAL QUESTIONS UNDER THE. *Elihu Root*. 1 Am. J. of Int. L. 273. See 20 HARV. L. REV. 337.
- JURISDICTION IN WIDE BAYS, CLAIMS OF TERRITORIAL. *A. H. Charteris*. 16 Yale L. J. 471. See *supra*.

- JURISDICTION, RECENT CONTROVERSY AS TO THE BRITISH, OVER FOREIGN FISHERMEN MORE THAN THREE MILES FROM SHORE. *Charles Noble Gregory*. 1 *Am. Pol. Sci. Rev.* 410. See *supra*.
- KNIGHT COMMANDER CASE, THE. *Theodore S. Woolsey*. 16 *Yale L. J.* 566.
- LARCENY AND THE PERKINS CASE. *Francis M. Burdick*. Maintaining that criminal intent should have been found. 7 *Colum. L. Rev.* 387. See 19 *HARV. L. REV.* 611.
- LARCENY OF A MAN'S OWN GOODS. *Anon.* 51 *Sol. J.* 407.
- LAW AND GOVERNMENT. *W. Harrison Moore*. Advancing the theory of the artificial *persona* of the state. 4 *Comm. L. Rev.* 50.
- MAITLAND, FREDERIC WILLIAM. *M. S.* 22 *Pol. Sci. Rev.* 282.
- MAITLAND, FREDERIC WILLIAM. *D. P. Heatley*, 19 *Jurid. Rev.* 1.
- MAITLAND, FREDERIC WILLIAM. *P. Vinogradoff*. 22 *Eng. Hist. Rev.* 280.
- MORTGAGE, THE EFFECT OF A GRANT OF LAND BY WAY OF. *T. Cyprian Williams*. Maintaining that the mortgagor should not be liable for a heriot. 51 *Sol. J.* 478, 496. See 20 *HARV. L. REV.* 652.
- MUNICIPAL CORPORATIONS, THE POWER OF, TO MAKE SPECIAL ASSESSMENTS FOR LOCAL IMPROVEMENTS. *Edson B. Valentine*. 65 *Cent. L. J.* 38; 68 *Alb. L. J.* 325.
- NATIONAL BANK LOANS, ARE UNDIVIDED PROFITS "SURPLUS" IN COMPUTING THE LIMIT OF? *Anon.* Contending that they are. 24 *Banking L. J.* 347.
- PARENT AND CHILD, SOME DOUBTFUL POINTS INCIDENT TO THE RELATION OF. *John A. Ferguson*. 4 *Comm. L. Rev.* 57. See *supra*.
- PATENTS, THE PROTECTION OF UNUSED. *Paul Bakewell*. Maintaining that equity should give protection. 19 *Green Bag* 406. See 20 *HARV. L. REV.* 638.
- PERSONAL LIABILITY OF MEMBERS OF VOLUNTARY ASSOCIATION, THE. *G. A. Endlich*. 55 *Am. L. Reg.* 337.
- POLICE POWER, WHAT IS THE? *Walter Wheeler Cook*. 7 *Colum. L. Rev.* 322.
- POSSESSION AND OWNERSHIP. II. *Albert S. Thayer*. Discussing the fundamental nature of these rights. 23 *L. Quar. Rev.* 314. See 3 *HARV. L. REV.* 23, 313, 337, 18 *ibid.* 196.
- RECORDING DEEDS IN AMERICA, THE ORIGIN OF THE SYSTEM OF. *Joseph H. Beale, Jr.* 19 *Green Bag* 335.
- SEPARATION AGREEMENTS. *Anon.* Discussing a late English case allowing a wife to sue for restitution despite a separation agreement. 26 *L. N. (London)* 209.
- STATE TAX ON ILLINOIS CENTRAL GROSS RECEIPTS, THE—ANOTHER VIEW. *James Parker Hall*. Maintaining that such tax is constitutional. 2 *Ill. L. Rev.* 21. See 20 *HARV. L. REV.* 503.
- SURFACE SUPPORT, THE RIGHT OF (Continued). *Joseph P. McKeahan*. Discussing a recent modification in Pennsylvania. 11 *Dickinson Forum* 147.
- TAXATION OF MOVABLES AND THE FOURTEENTH AMENDMENT. *John Bassett Moore*. Showing tendency of the Supreme Court to disregard the rule *mobilia sequuntur personam*. 7 *Colum. L. Rev.* 309. See 20 *HARV. L. REV.* 138.
- TAXATION OF BANK CAPITAL, EXEMPTION OF UNITED STATES SECURITIES FROM THE. *Anon.* 24 *Banking L. J.* 417.
- TOOL CASE OF COLORADO, THE—RIGHT OF APPELLATE TRIBUNAL TO ASSUME CHARGE OF ELECTIONS BY WRIT OF INJUNCTIONS. *Edward P. Costigan*. Contesting the right. 64 *Cent. L. J.* 402. See 20 *HARV. L. REV.* 157.
- UNIFORM STATE LAWS, COMMERCIAL ASPECT OF. *Francis B. James*. 5 *Mich. L. Rev.* 509.
- VARIANCE ON APPEAL, TAKING ADVANTAGE OF. *Albert Martin Kales*. Analyzing the Illinois cases. 2 *Ill. L. Rev.* 78.

II. BOOK REVIEWS.

DUE PROCESS OF LAW UNDER THE FEDERAL CONSTITUTION. By Lucius Polk McGehee. Northport, N. Y.: Edward Thompson Co. 1906. pp. 451. 8vo.

"I have long thought," wrote Prof. John C. Gray twenty years ago in the preface to his classic *Rule against Perpetuities*, "that in the present state of legal learning a chief need is for books on special topics, chosen with a view

not to their utility as the subjects of convenient manuals, but to their place and importance in the general system of the law." This belief has apparently given impulse to the series of "Studies in Constitutional Law" of which the present is the second volume. For the conception of the "Studies" the publishers deserve to be commended. But the particular "Study" has added practically nothing to our previous knowledge of the author's subject. Neither through the treatment, conception, analysis, nor comment on the cases has he made any substantial contribution to what is to be found in the digests. He has allowed himself sparingly the luxury of criticism, prophecy, or independent analysis. Yet he gives evidence here and there, as in his prefatory comments on *Haddock v. Haddock* and his remarks on the police power (pp. 361, 362), that he is possessed of no mean critical and analytical powers, so that we regret all the more that his evident learning and study should not have borne better fruit.

Perhaps it would not be just to dismiss the book without more detailed consideration justifying our convictions. For example, after pointing out the use of the phrase "due process" in the Vth and XIVth amendments, Mr. McGehee discusses the relation of the first ten amendments to the XIVth. He contents himself with setting forth the Supreme Court decisions to the effect that "due process" in the two amendments is not identical; that at least some of the rights guaranteed by the earlier amendments are not protected as against state action by the later one. Of course the subject is in an unsatisfactory and unsettled state, but Mr. McGehee makes no effort to elucidate it. What of a state statute, for instance, in line with Bentham's notion abolishing the privilege against self-crimination? Would it shipwreck on the XIVth amendment? Again, in his discussion of the rights protected by due process, — life, liberty, and property, — Mr. McGehee does not analyze his subject. Before determining whether a person has been deprived of one of these "inalienable rights," is it not essential to define the extent and nature of the right? That every word of the Constitution be given effect is the merest commonplace of construction, and yet Mr. McGehee makes a conglomerate of "life, liberty, and property." Several courts have found the "due process" requisite satisfied, when in fact in the given case no right was involved which "due process" protected. The Supreme Court, however, attaches a distinct connotation to each one of the three rights when a case calls for discrimination. See *Northwestern Ins. Co. v. Riggs*, 203 U. S. 243, 255.

In a number of instances Mr. McGehee's treatment of the cases is inadequate and unsatisfactory. In *Union Refrigerator Co. v. Kentucky* (199 U. S. 194) the Supreme Court decided that the state of the owner's domicile cannot tax personalty outside of the state. The author takes the decision as a matter of course, despite the fact, as implied by Mr. Justice Holmes' dissent, that the practice, however unjust, had time-honored sanction. In the *Ju Toy* decision (198 U. S. 253) the Supreme Court held that the determination of an executive officer on the issue of the citizenship of a person seeking entrance is final. Mr. McGehee characterizes it as "anomalous." This decision is a wide step in the plainly increasing tendency of enlarging the scope of so-called administrative law. Surely that is a mooted and fertile subject, inviting comprehensive discussion from the point of view of constitutional law. We might go on and speak of the treatment of the *Lochner* case (198 U. S. 45), *Boyd v. U. S.* (116 U. S. 616) and its relation to *Hale v. Henkel* (201 U. S. 43), *South Carolina v. U. S.* (199 U. S. 437), and many more. A few important decisions, we believe, are overlooked: *Jack v. Kansas* (199 U. S. 372), which holds the immunity provision of the Kansas Anti-Trust Act not violative of the XIVth amendment; *Harris v. Balk* (198 U. S. 215), which holds that a debt may be garnished wherever the debtor may be found. Building on the *Sturm* case (174 U. S. 710), the author adopts the artificial notion that a debt has a situs and tells us that for purposes of attachment the situs of the debt is at the residence of the debtor. In the *Harris* case, however, the Supreme Court finally rids itself of that artificial doctrine, at least in cases of attachments.

F. F.

THE FIRST YEAR OF ROMAN LAW. By Fernand Bernard. Translated by Charles P. Sherman. Oxford University Press. American Branch: New York. 1906. pp. xiii, 326.

It is difficult to see why M. Bernard's "First Year" should have been selected for translation. There are in the French, Italian, Spanish, and German languages many first books or "institutes" of Roman law which are as good as his, and some which are better, in that they are not mere compilations but works of original value. M. Bernard, indeed, asserts in his preface that his book is not a *memento* or cram-book, but it has a strong family resemblance to this species of literature. It bristles with details which only an examiner of the most pedantic type would expect a student to master in his first year. It gives no idea of the evolution of the Roman law; it is almost as unhistorical as a pre-Cujacian manual. It does not vivify the institutions and rules of which it treats, or indicate their connection with social life. To illustrate: the author devotes one-twelfth of his book to describing the gradations of status between slavery and full Roman citizenship, and one-third of a page to the *ius honorarium*. That the former topic was of practical importance in the time of Gaius is no reason why the modern student of jurisprudence should be troubled with its arbitrary antiquarian details. To the modern student, however, it is surely of importance to know that the edicts of the Roman magistrates in the provinces and at Rome were the instruments by which the different laws of the Mediterranean basin were first fused into a harmonious system and then incorporated into the Roman law,—the instruments, in a word, by which Roman law was transformed from archaic local custom into a highly developed world-law. Further evidence of the author's lack of historical sense, and illustrations of his incapacity to realize legal institutions, are afforded by his assertions that at Rome agricultural property (*res Mancipi*) was older than pastoral property (*res nec Mancipi*), and that mortgage without possession (*fiducia*), established by ceremonial sale, was older than pledge with possession (*pignus*). Nor is he able to perceive—at least he does not indicate—the connection between the rule that gifts between husband and wife were invalid and the rules regarding matrimonial property relations and divorce. Given, as at Rome, separate property rights of husband and wife and power on the part of either to terminate the marriage relation at pleasure, it would have been possible, but for the invalidity of gifts from one to the other, for an unscrupulous wife or husband not only to get the other's goods but to get away with them. But the chief defect of the book for English and American students, is to be found in the fact that the most valuable part of the Roman law, that dealing with obligations, is dismissed in eight pages—because in French law-schools obligations are studied in the second year.

M. Bernard cites (in addition to the sources) only French works and such German works as are written in Latin or have been translated into French. Mr. Sherman has added numerous references to English works, but his authorities are of very unequal value and he has unaccountably ignored some of the best. He cites, for example, Roby, Colquhoun, Poste, Morey, and Marion Crawford, but, so far as the reviewer has been able to discover, he does not cite Moyle or Clark or Greenidge. As a translator, Mr. Sherman lacks the first essential power: he does not find the English equivalent for the foreign phrase. To realize, for example, that "the recruiting of the tribunes" (p. 19) means making up the jury panels, and that the decree of the Senate "on the *intercessio* for the women" (p. 24) was a law invalidating female suretyship, the English reader must start with a knowledge of French or of Latin or of both, and must mentally reconstruct M. Bernard's phrases. In many other cases Mr. Sherman clings so closely to the French word or idiom that his translation, even where it is intelligible, is not English. Not having the French text at hand, the reviewer hesitates to hold the translator liable for repeatedly writing "minor" when *impubes* is meant (pp. 109 *et seq.*), or for stating that puberty was not attained until the completed sixteenth year (p. 127), or for substituting twenty for thirty years in the *lex Aelia Sentia* (p. 48, n. 1). It seems improbable, however, that a French law professor should make such mistakes.

There are nine pages of index; but in testing it on one particular subject the reviewer has sought in vain for the titles age, nonage, majority, minority, *pubes*, *impubes*, *pupillus*.
M. S.

THE LAW OF HOMICIDE. By Francis Wharton. Third Edition by Frank H. Bowlby. Rochester: Lawyers Co-operative Publishing Company. 1907. pp. clvi, 1120. 8vo.

Those who are familiar with the two older editions of Wharton will find considerable difficulty in recognizing the work in its present form. The first and second editions were of 537 and 794 pages and cited respectively about 750 and 1700 cases; the present edition has nearly as many pages and half again as many cases as the two older editions together. The index has been entirely rewritten and greatly enlarged. In general the arrangement of chapters of the second edition has been followed. In many cases, however, what was treated in a sentence in the older work has now, by the growth of new distinctions and increased decisions, grown into a topic necessitating several sections or even a chapter for its adequate consideration. Like the earlier editions, the present covers not only the substantive law of homicide, but the law of criminal procedure as well, so far as it relates to trials for homicide. There is also a lengthy chapter on evidence in homicide cases.

The present edition has nothing to indicate what parts of it are the work of the author and what of the editor. So far as can be judged from a comparison with the second edition it would seem that the text of Wharton had been used where possible as a starting-point for further distinctions and illustrative cases, and elsewhere simply incorporated in the present text. In some few chapters, as for example that on Elementary Principles as to Malice, the language of the second edition stands practically unchanged.

The treatise as it now stands has, so to speak, been "standardized." It is a logically arranged, detailed, and for the most part clear statement of the various doctrines of the law of homicide. These statements of the law have been illustrated and supported by an almost exhaustively complete collection of decisions. The annotation on the statutory degrees of murder (pp. 153 *et seq.*); the citations on the varying rules as to the necessity for retreat in cases of self-defense (pp. 476 *et seq.*) are good illustrations of the diligence with which the work has been done. For the practitioner who wants to know what the decisions are on a given point the book will prove of great value. Further than this, however, one cannot fairly go. There is little of the personality of the editor felt in the work. One feels throughout a distinct lack of the consideration of conflicting views from the standpoint of general principles, the suggestion of possible distinctions between apparently opposed cases, and the discussion of points not yet settled by decision, — elements that go to make a law treatise of the first rank.

H. A. B.

HISTORY OF ROMAN PRIVATE LAW. By E. C. Clark. Part I. Sources. Cambridge: At the University Press. 1906. pp. 168. 12mo.

Professor Clark's purpose is to write a "new History of Roman Law," and while a firm believer in Ihering's method of treating the facts relating to the subject (to make "a generalization of the Spirit of Roman law — as a whole" on the "relation of cause and effect") he has his own special point of view: "to trace the development of that part of Roman law which has more particularly survived to modern thoughts and times," because Roman law is "an example and a lesson of experience for practical politics and actual life." This Part I., "Sources," is a critical consideration of the "sources of our knowledge" of Roman law from earliest Roman history to the last of the cited jurists or the commencement of the era of imperial codification of Roman law, — a period of nearly eleven centuries (from the traditional founding of Rome, 754 B. C., to the Codex Hermogenianus, 314-339 A. D.). Professor Clark divides

the Sources into two classes, primary and secondary, and the latter are further arranged under the four subdivisions of Historians, General Literature, Antiquaries, Jurists. The primary Sources, including the recent discoveries of inscriptions, like those collected in "Bruns' Fontes Juris" by Mommsen and Gradenwitz, are plainly emphasized. The secondary Sources — considered at length in nearly three-fourths of the present work — are justly weighed after a careful examination into the material available to each author. Special praise should be given Professor Clark for his very complete, thorough, concise, and happy treatment of the Roman jurists.

He shows great familiarity with modern English, French, and German literature on the civil law, and references are very frequently made to the works of authors such as Cuq, Girard, Karlowa, Krüger, Muirhead, Lenel, Roby, and Teuffel. An instructive table of juristic writers and an excellent index complete the work, which discloses on every page the profound learning and painstaking research of its scholarly author, whose style, though condensed, is always interestingly clear.

C. P. S.

THE PRINCIPLES OF GERMAN CIVIL LAW. By Ernest J. Schuster. Oxford.

At the Clarendon Press. 1907. pp. xl, 684. 8vo.

The new German Empire created by Bismarck was begun on economic principles, was consolidated on the battlefield, and has recently been completed by a great work of legal codification. In 1874, three years after the proclamation of the Empire, a series of committees initiated this enormous task, which was virtually brought to accomplishment by the issue of a series of enactments between 1896 and 1900, of which the chief is the *Bürgerliches Gesetzbuch*, or Civil Code. Dr. Schuster, in the present well-produced and well-digested volume, surveys the whole field of the new German civil law on somewhat broad lines. The book may claim, however, to be something more than a general guide. Comparisons are constantly drawn between English and German law that might be of real value to students of comparative jurisprudence, especially in this country, where the conflict of state laws is closely akin to the conditions out of which the German codes arose. Many of the devices adopted by the German codifiers merit serious attention by their boldness and legal force. The contents of the book will appear more clearly from a statement of the titles of its parts: General Rules of Law; Creation, Transfer, and Extinction of Rights; Law of Obligations; Rules relating to Particular Kinds of Obligations; Obligations Created Otherwise than by Act-in-the-Law; Law of Things; Family Law; Law of Inheritance.

R. M. J.

THE INTERNATIONAL LAW AND DIPLOMACY OF THE RUSSO-JAPANESE

WAR. By Amos S. Hershey. New York: The Macmillan Company. 1906. pp. xii, 394. 8vo.

Amid the great mass of literature that has appeared dealing with one phase or another of the great conflict in the Far East between Russia and Japan, it is pleasant to find one book that has some claim to merit. This having been the first great war in the past quarter century, it naturally gave rise to many important questions relating to the rights, duties, and liabilities of neutrals. These questions have been taken up with some fulness in the chapters dealing with "The Construction, Sale, and Exportation by Neutrals of Warships, Submarine Boats, and other Vessels Intended for Belligerent Service"; "Russian Seizures of Neutral Merchantmen — The Right of Visit and Search and the Alleged Right of Sinking Neutral Prizes"; "Questions Relating to Contraband of War"; "The Rights and Privileges of Belligerent Armed Vessels in Neutral Ports and Waters"; and some others. Most interesting of all is the chapter entitled "War Correspondents, Wireless Telegraphy, and Submarine Mines," for here Professor Hershey shows how the belligerents met new situations which the rules of international law as developed in other wars failed to cover.

These modern inventions clearly call for a remaking of many of the rules of law to fit the warfare of the present day.

The book is of value in its suggestions. The author has a clear understanding of his subject, and shows much painstaking effort and careful work in collecting facts. His style is clear and pleasant, and though technical questions of law are considered, it can be read and enjoyed by any well-informed layman.

S. H. E. F.

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- SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY.** By various authors. Compiled and edited by the Association of American Law Schools. In three volumes. Volume I. Boston: Little, Brown, and Company. 1907. pp. 846. 8vo.
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- THE PRINCIPLES AND FORMS OF PRACTICE.** By Austin Abbott. In two volumes. Second Edition by Carlos C. Alden. New York: Baker, Voorhis and Company. 1907. pp. xiv, 1170; xi, 1171-2317. 8vo.
- A CODE OF FEDERAL PROCEDURE.** By Walter Malins Rose. In three volumes. San Francisco: Bancroft-Whitney Company. 1907. pp. xxx, 3186. 24cm.
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- A TREATISE ON SUITS IN CHANCERY.** By Henry R. Gibson. Second Edition. Knoxville, Tenn.: Gant-Ogden Company. 1907. pp. xx, 1203. 8vo.
- MARKETABLE TITLE TO REAL ESTATE.** By Chapman W. Maupin. Second Edition. New York: Baker, Voorhis and Company. 1907. pp. lxxvi, 910. 8vo.
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- THE LAW OF EVIDENCE.** By Sidney L. Phipson. Fourth Edition. London: Stevens and Haynes. 1907. pp. lxxx, 704. 8vo.
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. No. 2.

ENFORCEMENT OF A RIGHT OF ACTION ACQUIRED UNDER FOREIGN LAW FOR DEATH UPON THE HIGH SEAS.¹

II.

TO give a right of action for death upon the high seas is certainly not to make that maritime which was not maritime before.

In Hughes on Admiralty the learned author, after showing that there was an action for death under the law of France, Holland, Germany, and Scotland, says:²

"As these countries administer the law substantially the same in all their courts and do not have common law courts with one system and other courts with another system, the doctrine with them applies on land and sea alike. This prevalence of the doctrine among the leading Continental nations would seem to settle that it is at least sufficiently recognized to entitle it, in so far as it may be maritime in nature, to be considered a part of the general body of maritime law as administered by maritime nations. In other words, any other nation that may choose to adopt it into its jurisprudence is not making something maritime that was not maritime before, is not extending the limits of the general maritime law, but is merely drawing from that fountain something that was there already."

It should be further noted that as regards the question whether there is any right of action for death, there is no rule belonging specially to the maritime law as such. The question belongs to the general body of the municipal law which regulates the ordinary fundamental rights of person and property on land and sea, and which underlies the maritime law as the basis of its admin-

¹ Continued from 21 HARV. L. REV. 22.

² Hughes, Adm., 198.

istration. In a given country there will or will not be a right of action for death in the admiralty according as the municipal law does or does not give the right.

Chief Justice Waite, delivering the opinion of the court in *The Harrisburg*,¹ said :

"We know of no country that has adopted a different rule on this subject for the sea from that which it maintains on the land, and the maritime law, as accepted and received by maritime nations generally, leaves the matter untouched. . . . The argument everywhere in support of such suits in admiralty has been, not that the maritime law, as actually administered in common law countries, is different from the common law in this particular, but that the common law is not founded on good reason, and is contrary to 'natural equity and the general principles of law.' Since, however, it is now established that in the courts of the United States no action at law can be maintained for such a wrong in the absence of a statute giving the right, and it has not been shown that the maritime law, as accepted and received by maritime nations generally, has established a different rule for the government of courts of admiralty from those which govern courts of law in matters of this kind, we are forced to the conclusion that no such action will lie in the courts of the United States under the general maritime law. The rights of persons in this particular under the maritime law of this country are not different from those under the common law."²

In *The City of Norwalk* ³ Judge Brown, delivering the opinion of the District Court for the Southern District of New York, said :⁴

"It was upon the recognition of this principle alone, as I understand, that in the case of *The Harrisburg*, 119 U. S. 199, 213, 7 Sup. Ct. Rep. 140, it was decided that no action could be maintained in a court of admiralty of this country for loss of life, aside from statutory authority ; namely, because there is no rule on this subject belonging specially to the maritime law as such. 'It [the maritime law] leaves the matter untouched.' . . . And since the maritime courts in each country follow their own municipal law as regards giving damages for death, and inasmuch as by the common law of this country such a cause of action does not survive, the latter rule must, therefore, obtain in our courts of admiralty. In other words, it is the municipal law that on such a point determines the law applicable in a court of admiralty."

It is clear that there is a large class of questions, including the question as to whether there is a right of action for death, which,

¹ 119 U. S. 199, 213.

² 55 Fed. 98.

³ See *The Max Morris*, 28 Fed. 881, 884.

⁴ P. 107.

while they form a part of the general maritime law of a nation and frequently are to be decided by its courts of admiralty, nevertheless are solved by reference to the municipal law thereof. In other words, a large part of that law is necessarily a part of the maritime law. In the field of rights that is common to both the municipal and maritime law there can be no modification or amendment, unless expressly confined to one, that does not affect both systems. All civilized maritime states must and do recognize that, in matters where there is no peculiar or special rule of the maritime law, the maritime law of a nation cannot be expected to adopt, in respect of the ordinary fundamental rights of person and property, any different rules than are prescribed by its municipal law. The concession that any portion of the admiralty law is identical with the municipal law involves the admission of the fullest right of change and modification, at least within the common ground. The municipal law, of course, may be altered at the will of the nation. To hold that the maritime law cannot, would be to create, at the first change in the municipal law within the common ground, a difference between the two systems. The truth is that within this field it is expected, and generally conceded, as observed by Judge Brown,¹ that "the administration of the law in the maritime courts of different countries, therefore, though it might be the same in all that is peculiar to the maritime law, might in other respects differ widely, through the differences in the municipal law which in part enters into the adjudication of maritime causes."

As the question as to the right of action for death in the admiralty courts must be determined by reference to the municipal law, it follows that all the maritime states must recognize the right of each to give or withhold a remedy, according to the dictates of its municipal law, in respect of deaths occurring on the high seas, when its jurisdiction is invoked, whatever may be the nationality of the parties litigant.

If, therefore, there is any merit in the argument that as the admiralty jurisdiction rests on consent there is a limit to the changes which any one nation may make in its maritime law, at any rate, as far as foreigners are concerned, it has no applicability to the question under discussion.

It follows that according to the fundamental principles of the admiralty jurisdiction it is competent for France, by statutes and

¹ The City of Norwalk, *supra*.

decisions, not only to confer a right of action for death on the high seas upon a foreigner against a French citizen, but also on a French citizen against a foreigner, and it is the duty of the admiralty courts of all countries, the United States included, to recognize the competency of the French courts so to do.

The enforcement of the libellant's right under French law would not be contrary to the policy of the laws of the United States. The mere fact that the general maritime law, as understood and practiced in the United States, affords no remedy for death does not warrant the inference that such an action is contrary to the policy of the laws of the United States.¹ If it did, a right accruing under foreign law could never be enforced if the law of the forum did not give a similar right, whereas in fact, as has been seen, the law is clear, at least in the federal courts, that it is immaterial whether the law of the forum gives a similar right or not.

If the enforcement of the right acquired by the libellant under the French law conflicted with any right conferred on the defendant by the law of the United States, an American admiralty court, it is conceded, ought not to enforce the libellant's right and thereby abrogate or nullify the rights acquired by the defendant, though a foreigner, under the law of the United States.

Thus, navigation regulations were long ago enacted by Congress the effect of which was to give immunity from liability in case of collision to all United States citizens who conformed to those rules, and a right of action against those who violated the rules.

As said by Mr. Justice Strong in *The Scotia*:²

"If it were that the rules of the two nations conflicted, which would the British vessel, and which would the American, be bound to obey? Undoubtedly, the rule prescribed by the government to which it belonged. And if, in consequence, collisions should ensue between an American and a British vessel, shall the latter be condemned in an American court of admiralty? If so, then our law is given an extra-territorial effect, and is held obligatory on British ships not within our jurisdiction. Or might an American vessel be faulted in a British court of admiralty for having done what our statute required? Then Britain is truly not only mistress of the seas, but of all who traverse the great waters."

So, where a suit was brought in an American admiralty court for damage received during the voyage by cargo shipped by an Amer-

¹ *Evey v. Mexican Cent. Ry. Co.*, 81 Fed. 294, 304.

² 14 Wall (U. S.) 170. See also *The Belgenland*, 114 U. S. 355, 370; *The State of Alabama*, 17 Fed. 847, 855.

ican citizen on a British ship for transportation from a port of the United States to a British port under a British bill of lading signed by a British master, it was held that the provision in the bill of lading exempting the carrier in case of negligence of his servants would be no defense, irrespective of the question of public policy. The court held that although there was a good defense under the general maritime law of Great Britain, there was none under the general maritime law of the United States, and that the latter, viewing the transaction in its character of a tort upon the high seas, must prevail.¹

Obviously there the court could not extend to the defendant the immunity granted him by the British maritime law, because the American law had given the plaintiff a right of action of at least an equally high nature. Therefore, if the fact that the maritime law of the United States gave no right of action for death on the high seas was equivalent to an express right of immunity from liability to suit, there is no reason to doubt that it gave such right to every one, citizen or foreigner alike, and admiralty courts of the United States should not, by enforcing a right of action for death on the high seas given by the law of France, violate the right conferred by the law of the United States on the defendant. But it would be monstrous to hold that because no law binding on the admiralty courts of the United States has provided a civil remedy for death, therefore a right was conferred wrongfully or negligently to cause death, especially when the very acts which caused the death would, if followed by injuries merely, give rise to a right to recover damages.²

Because the law in providing a remedy for injuries caused by the negligence of another has failed to provide a remedy for the greatest of all injuries, death, it can hardly be contended that a general right is conferred on every one to be as negligent as he pleases, providing his victim is killed and not merely injured.

The result must be the same whether the statutory action for death proceeds upon the theory of a right accruing at the moment of death and passing by succession to the personal representative, or upon the theory of a new and independent right of action created for the benefit of those who suffer pecuniary loss by reason of the death. As against the deceased, it is clear that no one has any right to do what is liable to cause injury, whether attended with

¹ *The Brantford City*, 29 Fed. 373, 382.

² *Stewart v. B. & O. R. R. Co.*, 168 U. S. 445.

death or not. It would seem preposterous to hold that as against those suffering pecuniary loss from the death there is a right to do such an act because the law does not give them a remedy for their loss. What the law denounces as wrongful because of its effect on A to the extent of clothing A with a right of action cannot be considered rightful as to B who has no right of action, so that the person committing the act wrongful as to A must be regarded as possessing an absolute and positive right to do the act as against B. It cannot upon any sound principle of public policy be held that the law gives any one the right under any circumstances wrongfully to cause death. The discussion, of course, assumes that the right sought to be enforced is not in the nature of a penalty, such a right on familiar principles not being enforceable in a foreign jurisdiction.

That the mere absence of remedy is by no means equivalent to clothing the offender with positive immunity is aptly illustrated by the well-considered case of *The Avon*.¹ A ship belonging in the Province of Ontario and owned there, having collided with an American ship in the Welland Canal, was, on subsequently coming into an American port, libelled by the owners of the American ship in a court of admiralty of the United States. It was objected by the claimants that as the canal was exclusively in British territory and was exclusively British property, and as there were no admiralty courts in the Province of Ontario where the canal was located, and no admiralty jurisdiction in force there, the ship was not liable to seizure, at least as against a citizen of Ontario who had bought her after the collision and before the libel was filed. The court, however, sustained the libel, holding that although the *lex locus delicti* was exclusively within British territory, it was nevertheless within the jurisdiction of an American admiralty court, and that had the "collision occurred between two American ships, and no transfer had been made within the Dominion of Canada," there would have been no question of the right of the libellant to hold the vessel. The court conceded that if from the absence of the admiralty jurisdiction in Ontario it was to be inferred "that the principle of maritime law now sought to be enforced, is excluded by that of Canada, the remedy *in rem* should be denied." But it was held to be "not enough *per se* that a collision happens where there is municipal power to exclude the

¹ Brown Adm. (U. S.) 170.

maritime rule. It must further appear that it has actually done so." The court thought that "where both litigants are subjects of the country where the transaction occurs, and where no such remedy exists," our courts should refuse it between them, but repeated its conviction that "where the maritime law is clear, the mere absence of a local court to enforce its liens will not prevent an American court of admiralty from so doing."¹ The court accordingly enforced the familiar doctrine of the admiralty that a collision lien prevails even over a subsequent *bona fide* purchaser for value. It is certainly as competent for France by her general maritime law to confer a right of action on an American citizen in respect of a transaction occurring on the high seas as it was for the United States by its general maritime law to vest in one of its own citizens a right of property, good against all the world, in a vessel belonging to a British subject in respect of a transaction occurring exclusively within the British territory. The principle is the same in both cases. Wherever a court has jurisdiction of the subject matter and the parties, it may enforce any right, whether arising under the law of the forum or under foreign law, provided it does not conflict with a right acquired under some other law having concurrent jurisdiction in the premises.

It results that in the case under consideration, where the court obtained personal jurisdiction over the defendant, the libellant set out in his libel a right of action, transitory in its nature, duly acquired under the general maritime law of France. The District Court had jurisdiction of the cause of action in consequence of its maritime nature as a tort upon the high seas. The French maritime law was competent to give the right of action, so that a judgment in a French admiralty court would be recognized as valid in foreign jurisdictions. The enforcement of the right would not have been in conflict with the policy of, nor inconsistent with any right given by, the laws of the United States. Yet the court refused to enforce the right. The court might have at least gone to the extent of giving effect to the right in favor of a citizen of the United States.

In *Mulhall v. Fallon*² Chief Justice Holmes, delivering the unanimous opinion of the Supreme Judicial Court of Massachusetts, said: ³

¹ *Cf.* *The Eagle*, 8 Wall. (U. S.) 15; *Panama Railroad v. Napier Shipping Co.*, 166 U. S. 280.

² 176 Mass. 266.

³ P. 268.

"It is true that legislative power is territorial, and that no duties can be imposed by statute upon persons who are within the limits of another state. But rights can be offered to such persons, and if, as is usually the case, the power that governs them makes no objection, there is nothing to hinder their accepting what is offered."¹

However, if the admiralty courts of the United States are to refuse to enforce such a right in favor of a foreigner against a citizen of the United States, it would not much shock our sense of justice, however it might appear to our common sense, if they were to refuse to treat a citizen of the United States any better when he appeared as plaintiff. If the foregoing considerations are sound, the right should be enforced in either case.

It might be suggested that the result of this doctrine would be to enable the plaintiff in any kind of a controversy to pick out an admiralty jurisdiction favorable to his claim and demand to have the right conferred on him by the law of that jurisdiction enforced by the court in which he sued. If that were the inevitable result of the doctrine, it would, of course, be intolerable. Such, however, is not the inevitable result. There was a time when the courts of a nation might have established as a rule of law that they would enforce no such right, and the legislature may today by duly enacted laws deal with the subject as it sees fit. Beyond a doubt the courts, in a proper case, have still the authority where a rigid adherence to the principle laid down in *Dennick v. The Central R. R. of N. J.*² would lead to confusion or otherwise undesirable results, to pare down or revise the doctrine so as to make it adaptable to the needs of the community. So in the case supposed the admiralty courts of the United States, for instance, might say that while it was a rule of law in the United States that its courts should enforce rights duly acquired under foreign law, no consideration could or would be served by enforcing in a controversy between French and American parties litigant in relation to a transaction on the high seas a right of action arising under the maritime law of any other nation than France or the United States.

Of the authorities relied on by the District Court and the Court of Appeals in support of their conclusions that a right of action acquired under the maritime law of a foreign country for death on the high seas cannot be enforced in an American admiralty court

¹ See also *The E. J. Ward, Jr.*, 17 Fed. 456.

² 103 U. S. 11.

where one of the parties is an American,¹ none requires any particular comment so far as this article is concerned, except the dicta in *The Scotland*.² Both courts in the *Rundell* case seemed to think that the language there, repeated as it was in *The Belgenland*³ and *The Brantford City*,² completely covered the case before them, and was adverse to the libellant. It is important, therefore, to consider the exact point involved in these cases and the context out of which the language grew.

In *The Scotland* the suit was *in personam* against the owner, a British corporation, of the *Scotland*, a British steamship, for damage to property caused by collision on the high seas between it and the American ship *Kate Dyer*. The owner of the *Scotland* claimed the benefit of the limitation of liability acts of the United States. The libellant contended that those acts, properly construed, were not intended to apply to foreigners. The court, however, held that the acts did apply to foreigners, and that the owner of the *Scotland* was entitled to the benefit thereof. It will be seen, therefore, that the decision was purely a question of construction.

In the course of its opinion, however, the court said:

"If a collision occurs on the high seas, where the law of no particular state has exclusive force, but all are equal, any forum called upon to settle the rights of the parties would, *primâ facie*, determine them by its own law as presumptively expressing the rules of justice; but if the contesting vessels belonged to the same foreign nation, the court would assume that they were subject to the law of their nation carried under their common flag, and would determine the controversy accordingly. If they belonged to different nations, having different laws, since it would be unjust to apply the laws of either to the exclusion of the other, the law of the forum, that is, the maritime law as received and practised therein, would properly furnish the rule of decision. In all other cases, each nation will also administer justice according to its own laws. . . .

"Each nation, however, may declare what it will accept and, by its courts, enforce as the law of the sea, when parties choose to resort to its forum for redress. And no persons subject to its jurisdiction, or seeking justice in its courts, can complain of the determination of their rights by that law, unless they can propound some other law by which they ought to

¹ *The Harrisburg*, 119 U. S. 199; *The Alaska*, 130 U. S. 201; *The City of Norwalk*, 55 Fed. 98; *Robinson v. Navigation Co.*, 73 Fed. 883; *United States v. Rodgers*, 150 U. S. 249; *The Scotland*, 105 U. S. 24; *Insurance Co. v. Brame*, 95 U. S. 754; *Butler v. Steamship Co.*, 130 U. S. 527; *Armstrong v. Beadle*, 5 Sawy. (U. S.) 484; *The Belgenland*, 114 U. S. 355; *The Brantford City*, 29 Fed. 373.

² *Supra*.

be judged; and this they cannot do except where both parties belong to the same foreign nation; in which case, it is true, they may well claim to have their controversy settled by their own law. Perhaps a like claim might be made where the parties belong to different nations having the same system of law. But where they belong to the country in whose forum the litigation is instituted, or to different countries having different systems of law, the court will administer the maritime law as accepted and used by its own sovereignty."

The court further said: "Of course the rule must be applied, if applied at all, as well when it operates against foreign ships as when it operates in their favor." That is to say, if the Englishman sued the American in the United States the latter would be entitled to limit his liability under the Acts of Congress, and the Englishman would not be entitled to have the English rule, which would be less favorable to the respondent, applied as the law governing the case. The law of each nation in such a case would create specific rights and duties, which would be more or less conflicting, in respect of a transaction over which each had equal jurisdiction. Under such circumstances the American courts could not be expected to enforce the English law in preference to their own. Some indication is here afforded of what the court had in mind; namely, a conflict of rights acquired under the laws of countries having equal jurisdiction over the subject matter of the controversy. In such a case the rule would unquestionably be accurate.

In *The Belgenland* neither party claimed to have his case adjudged by the law of his own country. The only issues, apart from the merits of the controversy, were whether the District Court had jurisdiction, whether the assumption of jurisdiction was discretionary, and if so, whether the discretion had been rightly exercised. As the parties propounded no other law by which the suit should be governed than the law of the United States, the court could do nothing else than apply the law of the forum. Here too, therefore, the above-quoted remarks were dicta. That the court had its attention fixed on a case of conflicting rights is to some extent indicated by its observation that "neither party has any peculiar claim to be judged by the municipal law of his own country."

Such was unquestionably the case in *The Brantford City*.¹ Each party demanded the enforcement of rights acquired under the law

¹ A well-considered decision that received the approval of the Supreme Court in *Liverpool, etc., Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397.

of his own country. Those rights conflicted. The English law conferred a specific immunity on the defendant. The American law gave a specific right of action to the libellant. Neither side had any peculiar claim to be judged by the law of his own country. It would be unjust to choose the English law because one of the parties was English. It would be equally unjust to choose the American law because one of the parties was American. The inevitable result was the application of the law of the forum as the only alternative.

It is not improbable, therefore, that Mr. Justice Bradley in announcing the propositions now under discussion did not have in mind all the possible contingencies that might be covered by his language if taken literally, but was framing a rule to cover cases where different rights are acquired under the law of the countries of the several parties, where those rights are conflicting, and where each party insists on the rights so acquired by him.

It may be of use to indicate the different situations that may grow out of transactions occurring on the high seas. They may be classified as follows:

1. Cases where both parties belong to the country of the forum.
2. Cases where one of the parties belongs to the country of the forum and
 - a.* Each party seeks the application of the law of his own country ;
 - b.* Each party seeks the application of the law of his opponent's country ;
 - c.* Each party seeks the application of the law of the forum ; and
 - d.* Each party seeks the application of the foreign law.
3. Cases where neither of the parties belongs to the country of the forum, but both belong to the same foreign country or to different foreign countries having similar laws, and
 - a.* Both seek the application of the foreign law ;
 - b.* Both seek the application of the law of the forum ;
 - c.* One party seeks the application of the law of the forum and the other seeks the application of the foreign law.
4. Cases where neither of the parties belongs to the country of the forum but both belong to different foreign countries having dissimilar laws, and
 - a.* Both parties seek the application of the law of the forum ;
 - b.* One of the parties seeks the application of the law of the forum ;
 - c.* Each party seeks the application of the law of his own country ;
 - d.* Each party seeks the application of the law of his opponent's country ; and
 - e.* Both parties seek the application of the law of the country of one of them.

A subdivision of 1 might be made, but would be superfluous, as, for reasons already stated, in transactions occurring on the high seas rights acquired under the laws of any countries other than those of the contending parties should be disregarded.

According to the rule of *The Scotland*,¹ if literally construed without reference to the context, the law of the forum would be applied in 1, 2, and 4. The foreign law would be applied in 3. It is obvious that the wishes of both parties to the litigation might in many instances in this way be violated.

The question is plainly an intricate one, and it is dangerous to try and lay down a rule designed to cover all cases. It is not believed that Mr. Justice Bradley ever intended so to do. The rule as it stands appears to be based to some extent at least on the presumed wishes of the parties. Yet its application, if literally interpreted, would often thwart the wishes of both parties. It also apparently rests in part on the proposition that a court will *prima facie* administer its own law. Yet it calls for the enforcement of foreign law as against a foreigner seeking the application of the law of the forum.

The rule creates confusion by its method of approaching the subject. No man has any right to have one law rather than another applied to his case. No court should have any predilection for administering its own law rather than any other law, nor assume, because litigants usually seek to be adjudged by the law of their own countries, that they always do. The question is really one of legal rights and should be expressed in terms of legal rights.

The first questions for the court should always be what right does the plaintiff assert, and under what law does the asserted right arise. If the right appears to have been acquired under foreign law, the next subject of inquiry is whether the foreign law was competent to give it. If it was, and the enforcement of the right would not be contrary to the public policy, or in conflict with any right conferred by the law of the forum, then what possible reason can there be for refusing to enforce the right and thrusting forth the law of the forum as the governing rule? Where, in a controversy between parties of different nationalities, one of them seeks the enforcement of a right arising under foreign law, it will appear either that the law of the countries in-

¹ *Supra*.

volved is the same, in which case there would be no difficulty, or that there is a difference. In the latter case a specific conflicting right may be conferred on the opposing party, or the difference may simply be that no remedy is provided for the enforcement of an undoubted right. If the party stand on his conflicting right, here will clearly be a case for the application of the law of the forum. But it being his right and not the court's, he is entitled to waive it.

For example, a French ship and an English ship collide on the high seas, and a libel is instituted in an American admiralty court. Suppose the Frenchman asserts some right acquired under the French law, different from the American rule. The court refuses to enforce the right, because, perhaps, the English law gives contrary rights. Could not the Englishman waive the rights, if any, created by the English law and by the law of the forum, and thus submit the controversy to be governed by the French law? He may take a different view of that law than the Frenchman and regard his chances as better under that law than under his own or under the law of the forum.

Surely the court ought not to impose its own law for the sake of so doing, nor seek to enforce rights which no one asserts or which all waive. And so where the difference lies simply in the failure to provide a remedy for the enforcement of an undoubted right, there being no right in either party to call for the application of one law rather than another, the court being indifferent which law is applied, but being bound to enforce legal rights if it can without violating any other rights of equal value,—the party asserting the absolute right under the foreign law is entitled to have it enforced.

The rule of *The Scotland*,¹ if it be assumed to have been enunciated with reference to cases of conflicting rights insisted upon by the parties, is correct. It was probably intended to go no further. If it was, it is unsound.

There is no English authority directly in point. The jurisdiction of the English admiralty is governed by Section 7 of the Admiralty Court Act of 1861,² which provides "that the High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship." In 1868 Sir Robert Phillimore held that under this section a suit *in rem* lay in the admiralty to enforce a claim for loss of life under Lord Campbell's Act.³ In 1870 the same judge

¹ *Supra*.

² 24 and 25 Vict., c. 10.

³ 9 and 10 Vict., c. 93; *The Guldfaxe*, L. R. 2 A. & E. 325.

held that a proceeding *in rem* in the admiralty would lie in behalf of the legal representatives of French citizens on board a French ship, who were lost in a collision on the high seas between that ship and an English ship.¹ Finally, in 1877 Sir Robert Phillimore, following his two earlier decisions, held, in the case of a collision in the Straits of Dover between a German ship and a British vessel, that the English administratrix and widow of a British citizen who was on board the British vessel and was lost in the collision, could maintain a proceeding *in rem* under Lord Campbell's Act for the death.²

In the meantime in 1871 and 1872 the cases of *Smith v. Brown*,³ *James v. London & South Western Railway Company*,⁴ and *Simpson v. Blues*⁵ were decided, by which cases *The Guldaxe* and *The Explorer* were supposed to have been shaken.

In *Smith v. Brown* the admiralty court was prohibited by the Queen's Bench from taking jurisdiction of a proceeding *in rem* to enforce a right of action under Lord Campbell's Act for death occurring upon the high seas, on the ground that the damage referred to in Section 7 of the Admiralty Court Act did not include loss of life.

In *James v. London & South Western Railway Company* it was held that the admiralty court should be prohibited from entertaining a petition for the limitation of liability against certain claims for damages, including suits for loss of life occurring on the high seas. The decision both in the Court of Exchequer and in the Exchequer Chamber was based on the ground that the vessel was not under arrest when the petition to limit liability was filed. It was, however, stated in the Court of Exchequer, although the decision was not based on that ground, that the admiralty court could not entertain a suit for loss of life under Section 7 of the Admiralty Court Act.

In *Simpson v. Blues* it was held that as the admiralty would have no jurisdiction over a suit for the short delivery of cargo shipped under a charter party, the County Court would have no such jurisdiction, although it was provided by statute⁶ that such court should have jurisdiction to try causes as to any claim arising out of any agreement made in relation to the use or hire of a ship, provided the amount claimed did not exceed

¹ *The Explorer*, L. R. 3 A. & E. 289.

² L. R. 6 Q. B. 729.

³ L. R. 7 C. P. 290.

⁴ *The Franconia*, L. R. 2 P. D. 163.

⁵ L. R. 7 Exch. 187, s. c. 7 *ibid.* 287.

⁶ 32 and 33 Vict., c. 51, s. 2, § 1.

£30. It will be seen, therefore, that if *The Explorer* and *The Franconia* were shaken by the cases in the Queen's Bench, The Exchequer, and the Common Pleas, it was not at all on the ground that an action would not lie for or against foreigners in case of loss of life on the high seas, but solely on the ground that under Section 7 of the Admiralty Court Act the courts of admiralty had no jurisdiction of a suit under Lord Campbell's Act.

In 1884 the matter came before the House of Lords in *Seward v. Vera Cruz*.¹ This case arose out of a collision at the mouth of the Mersey between the *Vera Cruz*, a Spanish vessel, and a British vessel, the master of which was drowned. His personal representative brought an action *in rem* against the *Vera Cruz* to recover for the death. It was held that the liability of the shipowner under Lord Campbell's Act to make good damages caused by the master's negligence was not damage done by a ship, and that therefore the action would not lie. The House of Lords appears to have proceeded on the theory that inasmuch as the only action for damages for loss of life was that created by Lord Campbell's Act, and inasmuch as the action created by Lord Campbell's Act depended upon wrongful act, fault, or negligence, it could not be said that a ship, an inanimate thing, could be guilty of wrongful act, fault, or negligence, however much the persons in charge of it might be culpable.

Since, however, the admiralty court is now a division of the High Court, a proceeding *in personam* under Lord Campbell's Act may be instituted and maintained in the admiralty.²

It would appear, therefore, that the English law, as these decisions left it, was that in case of loss of life on the high seas a proceeding *in personam* might be maintained under Lord Campbell's Act in the English courts, although against British subjects, for the death of a foreigner, and against foreigners for the death of British subjects, provided, of course, the requisite jurisdiction of the parties existed.

The question again arose in *Adam v. British and Foreign Steamship Co., Ltd.*³ In that case a Belgian subject on board a Belgian ship lost his life in a collision on the high seas between the Belgian ship and a British ship. The court held that a personal

¹ 10 App. Cas. 59.

² *The Bernina*, L. R. 12 P. D. 58, s. c. on appeal, 13 App. Cas. 1; *The Orwell*, L. R. 13 P. D. 80.

³ [1898] 2 Q. B. 430.

action under Lord Campbell's Act did not lie in behalf of the personal representative of the mother of the deceased. The decision of the court was based solely upon its construction of Lord Campbell's Act, the court saying that the act was not intended by Parliament to apply to foreigners.

In *Davidsson v. Hill*¹ an exactly contrary decision was reached on precisely the same state of facts. Furthermore, Kennedy, J., said:

"It is not necessary to decide whether, assuming, of course, that no technical difficulty arises as to the service of proceeding, the action could be maintained in the English courts, the death occurring through negligence in a collision upon the high seas, where both parties were foreigners or where the wrongdoers were foreigners and the sufferers English. My personal opinion is that the action could be maintained, but I desire to be understood as not expressing, as it is not necessary to express, a decided opinion upon this point."

There never has been any question of the power of Parliament to give a right of action binding upon foreigners for death occurring upon the high seas. The only question in the English courts has been whether Parliament has exercised its power, and the probability is that in the future the English courts will hold that Lord Campbell's Act was intended to apply to transactions occurring upon the high seas both in behalf of and against foreigners.

While one nation is not always ready to accord to other nations the same measure of power which it itself exercises, nevertheless it may fairly be assumed that England would recognize the right in other nations to deal with cases of death upon the high seas in the same manner. If that is true, it follows that the English courts would, under the circumstances of the *Rundell* case, have enforced the right of action which arose under the French law.

As to the desirability on grounds of policy of allowing recovery under such circumstances, there would seem to be hardly room for more than one opinion. It is true, of course, that there would still be left many cases of wrongful death upon the high seas where there would be no remedy. But that is scarcely a reason for denying such measure of relief as the law in its present state warrants, especially in view of the fact that the law as administered in the admiralty courts of the United States would, by the establishment of the doctrine here contended for, be brought appreciably

¹ [1901] 2 K. B. 606.

nearer to what is now an almost universal rule among civilized communities; namely, that there shall be a right of action for wrongfully or negligently causing death. The fact that most of the European nations and substantially all of the states of the United States have adopted this rule shows that it is founded on a recognized moral principle which the law should approach rather than avoid. It may be suggested that the doctrine entrenches upon the limited liability rule. But it should be remembered, as already pointed out, that the federal courts have already taken the step of enforcing rights of action under state statutes for death occurring on state territorial waters, thereby imposing upon shipowners a far more serious liability than would be imposed by the adoption of the rule urged in this article. Furthermore, the liability for damages for causing death on the high seas may be limited as well as any other liability.¹

In any event a man's life is more important than his property.

G. Philip Wardner.

BOSTON.

¹ *Butler v. Boston Steamship Co.*, 130 U. S. 527.

THE NEXT STEP IN THE EVOLUTION OF THE CASE-BOOK.¹

THIS article assumes that the comparative merits of the case-book and the text-book methods of teaching law are no longer an issue in legal education. It assumes, also, that the case-books, as represented by those in use at the Harvard Law School, have driven the text-book pretty much out of existence as a means of instruction. Are these case-books, however, and those constructed on similar lines, the last word? Do they represent perfection for all time to come? Probably not. What, then, is to be the next radical step in their evolution? It is the purpose of this article to maintain that in the older and more important jurisdictions of the United States there is a legitimate and increasing demand for instruction in first-class law schools by case-books arranged, so far as topics treated are concerned, upon the lines of the present Harvard Law School case-books, but composed as far as practicable of cases from the particular jurisdiction, with the end to present an accurate exposition of the law in force at the present day in that jurisdiction. Such a demand will, it is believed, dictate the next radical step in the evolution of the case-book itself.

The securing of the approval of those who already agree with me would hardly justify the present effort. It is, therefore, my object to reach those who bristle with opposition at the very suggestion of the step proposed. Let me ask them, however, to put aside for the moment their opposition upon the ultimate matter for argument, and to consider briefly those preliminary matters about which we can all heartily agree.

We can agree in the first place, I think, that whatever excellence the Harvard Law School case-book may have, and whatever high function it may fulfil, it does not present a perfect and detailed

¹ The fact that the writer occupies a position as teacher in a law school which uses, perhaps as extensively as any, excepting Harvard itself, the Harvard Law School case-books, makes it necessary to say at the outset, with some emphasis, that the above article is written entirely in his private capacity. The views expressed in it must not be taken as representing those of any other member of the faculty of which he is a member, much less as being the foundation of any action by the school in the scope and subject-matter of its teaching.

picture of the present state of the law in any particular one of the older and more important jurisdictions of the United States. It is apparent that English law, so far as it is unaffected by the more modern statutes, is the only single system that is minutely examined in the cases of the particular jurisdiction where it is or was in force. No doubt only that part of the English law is taught which has in general been transplanted to America. Perhaps here and there a new subject is added which is not to be found at all in the English cases. It is obvious, also, that the Harvard Law School case-book contains American cases which tend to show modifications or departures from the rules of the English law in some jurisdictions in this country. Sometimes, perhaps, the American cases go a little farther and tend to show the adoption in a particular state of the rules of the English law. When all is said, however, it appears to be true that the Harvard Law School case-book does not, and does not purport to give an accurate and detailed picture of the law of any single American jurisdiction.

We can also all agree, I am sure, that the proper aim of the law school is to turn out lawyers well equipped for practice, or who will become so upon a comparatively brief apprenticeship. This is emphasized very neatly in a few words by Sir Frederick Pollock in a recent number of the *Law Quarterly Review* at the end of some appreciative remarks concerning the work of the late Professor Langdell.¹ He says:

"It is perhaps necessary to say here, though in America it is now superfluous, that the Harvard Law School under Professor Langdell's system has produced not mere theoretical students, but lawyers well equipped for practice. . . . Meanwhile the majority of the English bar, or at any rate of those in authority, continue, it seems, to believe that law cannot be taught at all. The Law Society thinks otherwise."

Obviously Sir Frederick Pollock justifies the teaching of law by law schools by repelling any insinuation that the law school gives its students merely a liberal education, or that it makes them historical scholars or mere theoretical lawyers. He justifies the teaching of law by law schools because they can produce, to use his own phrase, "lawyers well equipped for practice," or, to modify this very slightly, "lawyers who will become so upon a comparatively brief apprenticeship." This certainly does not mean, in the mouth of a member of the English bar, that they can produce merely

¹ 22 L. Quar. Rev. 335.

better and more efficient office clerks, or even attorneys and solicitors who become client caretakers, or professional trustees, or even the directors of great industrial enterprises and policies, but who never enter a court room on a contested matter. It means that the law school can and does equip the men who will become competent to handle the most difficult litigated problems of law and fact, whose work will be before the trial and appellate courts, and in whose hands the shaping of the law will lie, and whose ultimate destination may be leadership at the bar or an honorable place upon the bench.

We can also agree, I think, that the lawyer to be well equipped for practice at the bar in this exalted sense must know the actual rules of law in force where he practices. It is not enough that he knows where to find them. Practice could hardly be profitable or successful if one went upon the principle that no rule need be definitely known till the occasion for using it arises. It is not even enough that what the rule probably is may be known. The well-equipped lawyer is one who knows, in a field of considerable extent at least, the exact situation in a given jurisdiction. He may also know whether it is right or wrong, or how it compares with the rule in force in other jurisdictions, but, first of all, he *knows* what the rule is. He necessarily knows what the rules are in the terms of the decisions of the particular jurisdiction. He may indeed distinguish between good exposition and bad, but, at any rate, he knows the terms in which the fixed results are expressed.

A reasonable amount of agreement upon these preliminary matters will make the issue between us quite plain and precise. Those who are well satisfied with the present Harvard Law School case-books will no doubt concede that to cause one who has mastered their contents to be well equipped for actual practice at the bar of one of the older and more important jurisdictions, much toil and effort over the local law is necessary. On the other hand, I must in fairness admit that this line of effort is to some extent inevitable, and that a law school cannot expect to turn out graduates at once well equipped for practice at the bar in such jurisdictions. The real question between us is this: Does the present case-book go far enough in equipping its graduates for actual practice at the bar in the older and more important jurisdictions? The answer to this question depends entirely upon how long it takes in such jurisdictions to bridge the gap between that knowledge which is the reward for having mastered the case-books, and that which is necessary to

a good working knowledge of the substantive law in the particular jurisdiction. If it takes only a short time, then no doubt the case-book is doing all that can be expected of it. If it takes a long time, if in fact the work is so laborious that it cannot be done under ordinary circumstances within a reasonable time, and consequently is not being done at all, then the case-book is certainly open to objection.

The charge against the present Harvard Law School case-book is that in the older and more important jurisdictions the work of checking up its results with the local law has become an impossibility. It does not merely take time. It can't be done. Life is too short. I venture to assert that to obtain a good working knowledge of the law in such jurisdictions on topics studied in the Harvard Law School case-book, it is necessary carefully to note the actual departures by statute and by decision from the law as taught by the case-book, to supply new topics closely related to the subject-matter of the case-book, to learn the well-settled rules taught by the case-book, or the solution of controverted questions, in terms of the cases of the particular jurisdiction. I do not hesitate to affirm that these steps involve so much labor that the individual student who has mastered the subject-matter of the case-books can no longer do it for the courses or even the majority of those which he studies during three years in a law school.

This is too serious a charge to be made without something in the way of proof.

Suppose, then, we resort to experiment to determine how long it will take a student of the Harvard Law School case-books to master the law in one of our older and more important jurisdictions on the subjects covered by those case-books. Suppose, for instance, we attempt to estimate what the student of the fifth and part of the sixth volumes of Gray's Cases on Property, concerning conditional and future interests and illegal conditions and restraints, must do to gain exact knowledge of the status of the Illinois law on the subjects studied, and how long it will take him.

I am aware, of course, that the details of the Illinois law, as such, are of no interest whatever here, but what you would not consider for itself may well arrest your attention because of the general condition which it typifies.

It cannot be made too clear at the outset that our student has no exact knowledge of the rules in Illinois on the topics he has

studied in Gray's Cases. That does not mean that most of the propositions learned from Gray's Cases are not law in Illinois. It does mean that the departures from those propositions and the new topics are such that until the whole field is covered and all the Illinois cases classified and arranged so as to reveal the departures, the new topics, the exact propositions incorporated into the Illinois law by actual decisions, and those left still undecided, no exact or professionally valuable knowledge of the state of the law in Illinois can be had.

The student of Gray's Cases will think that a right of entry for condition broken is inalienable by deed and very likely also inalienable by devise. Yet he can be shown Illinois cases where alienation in both ways has been sustained.¹ The student will know that legal contingent remainders and executory interests are inalienable by deed at law. Nevertheless, he can be shown a recent Illinois case which holds that such interests are alienable at law within certain peculiar limits.² The student no doubt thinks that in the absence of statute a legal contingent remainder is destructible in Illinois, and yet he can be shown a case where a life estate preceding a contingent remainder was determined by merger in the reversion prior to the birth of the child to whom the contingent remainder was limited, and where, nevertheless, the remainder was held not to be destroyed.³ No doubt the student has preconceived ideas concerning what remainders are vested and what are contingent. If so, upon the production of a few recent Illinois cases he will readily perceive that there are at least four different distinctions between vested and contingent interests in daily use.⁴ In short, he will find in the Illinois cases that his notions of what interests are vested and what not are in a very puzzling state of decay. The student has learned that upon the dissolution of a charitable corporation without debts, the title to land held by it will escheat to the state.⁵ But the Illinois cases hold that there is a right of reverter to the donor or his heirs.⁶ In accordance with one of the cases reprinted by Mr. Gray,⁷ the student doubtless

¹ Helm v. Webster, 85 Ill. 116; Gray v. Chicago, etc., R. R., 189 Ill. 400.

² Boatman v. Boatman, 198 Ill. 414.

³ Frazer v. Board of Supervisors, 74 Ill. 282.

⁴ See Vested and Contingent Future Interests in Illinois, 2 Ill. L. Rev. (Dec. 1907).

⁵ Gray, Rule Perp., 2 ed., §§ 44-51; Johnson v. Norway, Winch 37.

⁶ Life Ass'n of Am. v. Fassett, 102 Ill. 315, 323, *semble*; Mott v. Danville Seminary, 129 Ill. 403; Presbyterian Church v. Venable, 159 Ill. 215.

⁷ Papillon v. Voice, 2 P. Wms. 471, 5 Gray, Cas. on Prop., 95.

thinks that the Rule in Shelley's Case does not apply where, after an equitable life estate to A, there is a direction to trustees to convey to A's heirs. Yet an Illinois case holds that to such limitations the Rule does apply.¹ No doubt there is to the student no proposition more fundamental or more certain than that shifting interests in deeds which may take effect as bargains and sales under the Statute of Uses are valid. Yet the Illinois Supreme Court has frequently denied this, declaring a shifting interest, or, as it is often termed, "a fee on a fee," void when attempted to be created by deed.² In one case at least the court squarely so held.³ In the same way the student will regard a conveyance by deed capable of taking effect by way of bargain and sale to A and his children born and to be born, as valid to carry the fee to all the members of the class born at the time of the conveyance or afterwards. Nevertheless, in Illinois the inference from the cases is that the conveyance is valid only as to those who are *in esse* at the time the deed is executed.⁴ Perhaps the student would be amused if he were asked seriously whether a shifting executory devise were valid. Yet there was a time not very long ago when two cases in the Illinois reports⁵ holding that an unobjectionable shifting interest by will was void, on grounds which would make all executory devises invalid, stood unimpeached. The student will no doubt think that upon the failure of a gift over for remoteness the preceding gift stands as limited. But several striking cases in Illinois appear to make the rule rather that the preceding gifts which are not too remote will also fail.⁶ A gift over if the first taker "die without issue," the student will have learned means die without issue either before or after the death of the testator or settlor. Yet an Illinois case can be produced where without any special context it meant die without issue in the lifetime of the testator only.⁷ So he has learned that "die without issue" means primarily, in the absence of statute, an indefinite failure of issue.

¹ Wicker v. Ray, 118 Ill. 472.

² Siegwald v. Siegwald, 37 Ill. 430, 438; Glover v. Condell, 163 Ill. 566, 592; Strain v. Sweeney, 163 Ill. 603, 605; Stewart v. Stewart, 186 Ill. 60; Kron v. Kron, 195 Ill. 181; Johnson v. Buck, 220 Ill. 226, 1 Ill. L. Rev. 188.

³ Palmer v. Cook, 159 Ill. 300.

⁴ Miller v. McAlister, 197 Ill. 72; Morris v. Caudle, 178 Ill. 9.

⁵ Ewing v. Barnes, 156 Ill. 61, 67; Silva v. Hopkinson, 158 Ill. 386, 389.

⁶ Lawrence v. Smith, 163 Ill. 149; Eldred v. Meek, 183 Ill. 26; Petzel v. Schneider, 216 Ill. 87.

⁷ Kohtz v. Eldred, 208 Ill. 60.

Yet an examination of the Illinois cases will tend to persuade him that without the aid of statute the regular rule has been so changed that the phrase means primarily a definite failure of issue in the first generation.¹ He will have learned that a gift over of real estate on an indefinite failure of issue turns the preceding interest of the first taker into an estate tail. Yet an examination of the Illinois cases and a consideration of the indirect effect of the Illinois Statute on Entails will cause him to doubt the soundness of this result in Illinois.² The Illinois case of *Carper v. Crowl*³ will make our student wonder whether the Rule of *Yates v. Phettiplace*,⁴ that a legacy to A to be paid at twenty-one charged on real estate is contingent upon A's reaching twenty-one, is the law of Illinois. Our student will find the Rule in *Wild's Case*⁵ and the doctrine of illusory appointments abolished without the direct aid of statute.⁶ He will find an Illinois case,⁷ apparently departing from the Rule of *Holloway v. Holloway*,⁸ that upon a devise to A for life and then to the testator's heirs, of whom A is one, heirs means those who are heirs of the testator at the time of his death, including A. The student will have learned that the doctrine of the common law and everywhere upheld, that a condition of forfeiture on alienation attached to a life estate upon its creation, is valid, but that a restraint on alienation attached to a legal life estate is everywhere wholly void. Nevertheless, in Illinois both these results seem to have been reversed. The condition of forfeiture attached to a life estate is void,⁹ while the restraint on alienation of a legal life estate is valid.¹⁰ Our student has no doubt learned that bad as is the spendthrift trust doctrine, it can nowhere be invoked unless the settlor expressly imposes the re-

¹ *Summers v. Smith*, 127 Ill. 645, 650-651; *Smith v. Kimbell*, 153 Ill. 368, 376; *Healy v. Eastlake*, 152 Ill. 424; *Kellett v. Shepard*, 139 Ill. 433; *Seymour v. Bowles*, 172 Ill. 521; *Johnson v. Askey*, 190 Ill. 58; *Strain v. Sweeney*, 163 Ill. 603; *Gannon v. Peterson*, 193 Ill. 372.

² *Strain v. Sweeney*, 163 Ill. 603; *Healy v. Eastlake*, 152 Ill. 424; *Seymour v. Bowles*, 172 Ill. 521; *Johnson v. Askey*, 190 Ill. 58.

³ 149 Ill. 465, 482-485.

⁴ 2 Vern. 416, 5 Gray, Cas. on Prop., 263.

⁵ 6 Co. 17.

⁶ *Davis v. Ripley*, 194 Ill. 399; *Boehm v. Baldwin*, 221 Ill. 59; *Hawthorn v. Ulrich*, 207 Ill. 430.

⁷ *Thomas v. Miller*, 161 Ill. 60, 72.

⁸ 5 Ves. 399, 5 Gray, Cas. on Prop., 318.

⁹ *Henderson v. Harness*, 176 Ill. 302.

¹⁰ *Christy v. Pulliam*, 17 Ill. 59; *Pulliam v. Christy*, 19 Ill. 331; *Christy v. Ogle*, 33 Ill. 295; *Emerson v. Marks*, 24 Ill. App. 642.

straint on alienation desired. Nevertheless, he must learn that in Illinois a practical restraint on involuntary alienation for the benefit of creditors exists in favor of a *cestui* who does not settle property upon himself, even where no express language provides for any such protection.¹

The retort to this recital is very obvious. It is easy to make fun of the Illinois Supreme Court, and to declare that if anything needs reforming, it evidently does. But this vein of humor is futile. It is grim comfort to your graduate who has passed upon a title, made a fatal mistake, and is put down as incompetent. Your humor will fall flat, and your teachings will receive less credit than they deserve when your graduate finds that commercially and professionally his knowledge is still far from what it must be. While you are indulging a mild propensity for humor, somebody is condemning your school for the very inaccurate and incomplete picture of the law which it has given.

There are not merely departures in the Illinois law to be learned by the Harvard Law School case-book graduate. Important new topics directly connected with the fabric of the whole subject-matter exist to be mastered. Mention of these will also tend to convince the student that his knowledge of the Illinois law is *in posse* rather than *in esse*. The rights of the dedicator and the abutting owner when there has been a statutory dedication is an exceedingly important subject. Legislation and the cases have made it extremely difficult to handle.² A knowledge of statutory conditions of forfeiture and the statutory modes of perfecting a forfeiture of terms for years is an indispensable part of the law of landlord and tenant in daily use, and fully dealt with in the decided cases.³ A whole chapter on the statutory remainder created by the Statute on Entails must be mastered.⁴ Most puzzling questions arise in regard to it, all of which are dealt with in some fashion in the Illinois cases and the cases from four other states having the same statute. The application of the inheritance tax law to future interests is of extreme practical importance.⁵

If the student has by this time come to recognize the professional difference between knowing what the Illinois Supreme Court has

¹ Potter v. Couch, 141 U. S. 296; Binns v. La Forge, 191 Ill. 598. See 1 Ill. L. Rev. 321-322.

² Kales, Future Interests in Illinois, §§ 2-13.

³ Kales, *ibid.*, §§ 21-26, and 30a-40a.

⁴ Kales, *ibid.*, §§ 114-120.

⁵ Kales, *ibid.*, § 185, note.

held and what Gray's Cases teach us to expect that it will hold or may have held, he will be ready with becoming humility to collect the Illinois cases *en masse* on the subject of future interests and classify them under each of the chapters and sub-sections of the fifth and part of the sixth volume of Gray's Cases, so as to show what propositions learned from those cases have become the law of this state by actual incorporation, and what, on the other hand, have yet to be expressly adopted.

The student will find approximately six hundred Illinois cases on the subjects of conditional and future interests, and illegal conditions and restraints as developed in Gray's Cases. Practically all of these six hundred cases are from the Supreme Court reports. A classification and arrangement of them according to the chapters and sub-sections of Gray's Cases will reveal quite a surprising amount of material. I venture to assert that at least two-thirds of all the points developed by this portion of Gray's Cases can be reproduced in the Illinois cases. Many topics can be duplicated almost entire. This is especially true of the subject of vested and contingent remainders and the Rule in Shelley's Case; that part of the subject of cross-limitations which Mr. Gray was accustomed to cover when I took his course; gifts over on failure of issue; vesting of legacies; determination of classes; and the Rule against Perpetuities, excepting the section on powers. We shall find also that many cases which Mr. Gray gives can be duplicated by Illinois cases. The doctrine of Dumpor's Case¹ is indicated and an important practical qualification of it announced in *Kew v. Trainor*.² The Rule of *Hayden v. Stoughton*,³ that a right of entry for condition broken is transferable by devise, is applied in *Gray v. Chicago, Mil. & St. Paul Ry. Co.*⁴ On the distinction between vested and contingent remainders, *Haward v. Peavey*⁵ could be substituted for *Blanchard v. Blanchard*,⁶ and *Harvard College v. Balch*⁷ for *Doe v. Martin*.⁸ Practically all of the points on the Rule in Shelley's Case, including the problem presented in *Perrin v. Blake*,⁹ which

¹ 4 Co. 119b, 5 Gray, Cas. on Prop., 23.

² 150 Ill. 120.

³ 5 Pick. (Mass.) 528, 5 Gray, Cas. on Prop., 10.

⁴ 189 Ill. 400.

⁵ 128 Ill. 430.

⁶ 1 Allen (Mass.) 223, 5 Gray, Cas. on Prop., 225.

⁷ 171 Ill. 275.

⁸ 4 T. R. 39, 5 Gray, Cas. on Prop., 62.

⁹ 1 W. Bl. 672, 5 Gray, Cas. on Prop., 98.

are illustrated in Gray's Cases, are to be found in the Illinois cases.¹ The validity of springing future interests created by deed is fully established in Illinois.² The problem of *Hughes v. Ellis*³ is raised in *Mills v. Newberry*.⁴ The Illinois cases illustrate two fundamental and important principles with reference to future interests in personal property which are brought out in Gray's Cases, *i. e.*, that future interests in personal property can be created by deed or will, or even by a mere contract sufficient to pass title;⁵ also that upon the gift of a chattel for life with no further limitation, there is a reversionary interest in the settlor or the testator's executor.⁶

Practically all of the rules of construction indicated by such cases as Mr. Gray was accustomed to assign for the consideration of the class when I took his course, are brought out in the Illinois cases, *i. e.*, the rule as to when cross-remainders will be implied;⁷ when "survivor" will be construed "other";⁸ the necessity of express words to enable shares accrued by survivorship to pass to survivors;⁹ the meaning of "die without issue," including the construction of the phrase "die without *leaving* issue";¹⁰ the construction of the limitations where the gift is in case either one of two persons die without issue, then to the *survivor*;¹¹ the important rules concerning the vesting of legacies, including the effect of an express direction as to vesting;¹² the force of the phrase "*to be paid* at twenty-one";¹³ the force of the phrase "to A at twenty-one,"¹⁴ a qualification of the general rule as to vesting when the postpone-ment is for the convenience of the estate;¹⁵ the effect of the pay-

¹ Kales, Future Interests in Illinois, §§ 127-135.

² Shackleton v. Seabee, 86 Ill. 616.

³ 20 Beav. 193, 5 Gray, Cas. on Prop., 210.

⁴ 112 Ill. 123.

⁵ McCall v. Lee, 120 Ill. 261.

⁶ Boyd v. Strahan, 36 Ill. 355.

⁷ Lombard v. Witbeck, 173 Ill. 396, 409-411.

⁸ Lombard v. Witbeck, 173 Ill. 396; Duryea v. Duryea, 85 Ill. 41.

⁹ Lombard v. Witbeck, 173 Ill. 396, 409-411.

¹⁰ Smith v. Kimbell, 153 Ill. 368; Hinrichsen v. Hinrichsen, 172 Ill. 462; Metzen v. Schopp, 202 Ill. 275.

¹¹ Summers v. Smith, 127 Ill. 645; Arnold v. Arnold, 173 Ill. 229; Hinrichsen v. Hinrichsen, 172 Ill. 462; Waldo v. Cummings, 45 Ill. 421; Johnson v. Johnson, 98 Ill. 564.

¹² Chapman v. Cheney, 191 Ill. 574.

¹³ Ruffin v. Farmer, 72 Ill. 615.

¹⁴ Powers v. Egelhoff, 56 Ill. App. 606; Howe v. Hodge, 152 Ill. 252, 255-277.

¹⁵ Schofield v. Olcott, 120 Ill. 362; Hawkins v. Bohling, 168 Ill. 214; Ducker v. Burnham, 146 Ill. 9-24; Knight v. Pottgieser, 176 Ill. 368; Dee v. Dee, 212 Ill. 338, 352-354.

ment of income on vesting; ¹ the effect of a gift over as furnishing an argument for the vesting of the prior gift; ² and the rules as to the determination of classes, including the problem of *Viner v. Francis*,³ which is precisely reproduced in *Lancaster v. Lancaster*; ⁴ the probable meaning of "youngest" when the gift is to the children of A when the youngest reaches twenty-one; ⁵ and especially the rules concerning the meaning of "heirs" where the gift is to A for life or in fee, with a gift over to the testator's heirs at law.⁶ The subjects of the survival of powers,⁷ what words exercise a power,⁸ and appointed property as assets,⁹ as these subjects were covered by the assignment of cases when I took Mr. Gray's course, are well brought out in the Illinois cases. On the subject of the Rule against Perpetuities, *Bauer v. Lumaghi Coal Co.*¹⁰ might be substituted for *London & S. W. Ry. v. Gomm*,¹¹ *Wakefield v. Van Tassel*¹² for *Dunn v. Flood*¹³ (holding *contra* to *Dunn v. Flood* that a right of entry for condition broken is not subject to the Rule against Perpetuities), *Bigelow v. Cady*¹⁴ for *Slade v. Patten*,¹⁵ and *How v. Hodge*¹⁶ for *Leake v. Robinson*.¹⁷ Where there is a gift to A for life with power in A to transfer the whole interest by deed or will, it is established by an excessive number of Illinois cases that a gift over in default of alienation by deed or will is valid.¹⁸ The whole subject of the validity of shifting gifts over upon alienation by deed alone of the first taker or upon alienation by will alone of the first taker,¹⁹

¹ *Howe v. Hodge*, 152 Ill. 252; *Lunt v. Lunt*, 108 Ill. 307.

² *Illinois, etc., Co. v. Bonner*, 75 Ill. 315; *Ridgeway v. Underwood*, 67 Ill. 419; *Lunt v. Lunt*, 108 Ill. 307; *Eldred v. Meek*, 183 Ill. 26.

³ 2 Cox Ch. 190, 5 Gray, Cas. on Prop., 307.

⁴ 187 Ill. 540.

⁵ *Handberry v. Doolittle*, 38 Ill. 202; *McCartney v. Osburn*, 118 Ill. 403.

⁶ *Kellet v. Shepard*, 139 Ill. 443; *Johnson v. Askey*, 190 Ill. 58; *Burton v. Gagnon*, 180 Ill. 345.

⁷ *Kales, Future Interests in Illinois*, §§ 237-242.

⁸ *Kales, ibid.*, §§ 245-246; *Harvard College v. Balch*, 171 Ill. 275, 285; *Funk v. Eggleston*, 92 Ill. 515; *Goff v. Pensenhafer*, 190 Ill. 200; *Foster v. Grey*, 96 Ill. App. 38.

⁹ *Gilman v. Bell*, 99 Ill. 144.

¹⁰ 209 Ill. 316.

¹¹ 20 Ch. D. 562, 5 Gray, Cas. on Prop., 579.

¹² 202 Ill. 41.

¹³ 25 Ch. D. 629, 5 Gray, Cas. on Prop., 593.

¹⁴ 171 Ill. 229.

¹⁵ 68 Me. 380, 5 Gray, Cas. on Prop., 615.

¹⁶ 152 Ill. 252.

¹⁷ 2 Meriv. 363, 5 Gray, Cas. on Prop., 622.

¹⁸ *Kales, Future Interests in Illinois*, § 168a, note.

¹⁹ *Stewart v. Stewart*, 186 Ill. 60.

or upon alienation by deed or will (*i. e.*, upon intestacy) of the first taker,¹ or upon the death of the first taker without issue and intestate,² is quite as fully dealt with in the Illinois cases as in the English cases which Mr. Gray has given us. I might add that this line of Illinois cases is, apart from any connection with the local law, much more interesting than similar cases which have arisen in England. As showing that a restraint upon the alienation of a fee, either absolutely or for a particular time, is void, Illinois has several cases.³ *Lunt v. Lunt*⁴ fairly takes the place of *Clafin v. Clafin*.⁵

Several nice problems that Mr. Gray apparently could find no case to illustrate when he published his Cases, are to be found solved by decisions of the Illinois Supreme Court. Thus, if the limitations are to A for life with a gift over to the testator's heirs at law, and A is the sole heir of the testator at the time of his death, A will not take the remainder.⁶ So, if the interests be to A in fee, but if A dies without leaving issue, then to the testator's heirs at law, and A is one of several heirs at law of the testator, "heirs" means heirs at law of the testator at his death.⁷ In *Madison v. Larmon*⁸ we have perhaps the only instance on record of the court taking the view that where a contingent remainder is fully destructible according to the rule of the common law, the Rule against Perpetuities applies to it. In *Pitzel v. Schneider*⁹ there is actually held the rather startling proposition which Mr. Gray announces in the second edition of his Rule against Perpetuities,¹⁰ but for which he was then unable to give any authority, that a gift to a class vesting in a single member of the class at the testator's death, may nevertheless be wholly void for remoteness, if as a matter of fact the maximum size of the share of each member of the class may not be determined until too remote a time.

Do not think that because the results of such a classification and arrangement of the Illinois cases may be in part thus easily and simply stated, the process of making it is easy and simple. The

¹ *Wolfer v. Hemmer*, 144 Ill. 554; *Kron v. Kron*, 195 Ill. 181; and many other cases. See Kales, *Future Interests in Illinois*, § 169.

² *Friedman v. Steiner*, 107 Ill. 125; *Burton v. Gagnon*, 180 Ill. 345; *Koeffler v. Koeffler*, 185 Ill. 261; *Orr v. Yates*, 209 Ill. 222.

³ *Jones v. Port Huron Engine Co.*, 171 Ill. 502; *Bowen v. John*, 201 Ill. 292, 296; *Smith v. Kenny*, 89 Ill. App. 293.

⁴ 108 Ill. 307.

⁵ 149 Mass. 19, 6 Gray, *Cas. on Prop.*, 141.

⁶ *Burton v. Gagnon*, 180 Ill. 345.

⁷ 216 Ill. 87.

⁸ *Johnson v. Askey*, 190 Ill. 58.

⁹ 170 Ill. 65.

¹⁰ § 205 *a*.

collection of the list of cases is of itself a difficult and tedious task, requiring at least a search of the index-digest of each volume of reports under many different topics. The reading of six hundred cases is also a considerable task. The reading of many and the continued consideration of many to determine just what they decide or how they are to be supported, or on what ground they are to be condemned or doubted — often requiring much further investigation at large — is a great time consumer. Elucidating entirely new topics often proves difficult. In my opinion — and upon this point I am sorry to say that I can offer only an opinion supported by the facts which I have detailed and the reader's experience — this work is not possible for a man who goes into a busy office on a salary, with the prospect of a managing clerkship in a few years. It is not simply a difficult thing to do. He can't do it. If he is fortunate enough to be able to command his own time and devote one-half of it to this work, I think he might check up the Illinois cases on the subjects of conditional and future interests and illegal conditions and restraints in two years. It has actually taken one of Mr. Gray's pupils three years to do the work and to incorporate it in a book of four hundred pages of text. This required him to devote at least one-half of his whole time to the work, although he had the advantage of teaching a class upon those subjects at the same time. If this experience and experiment are worth anything, I have no hesitation in declaring that it is high time we ceased pretending that the mastery of Gray's Cases on the subjects of future interests is a quick asset in Illinois.

There is a strong probability that what is true respecting the gap between Gray's Cases on future interests and the Illinois law is equally true of the gap between Gray's Cases on the other subjects dealt with and the actual state of the Illinois law. My opinion on this point is based on a personal collection and arrangement of the Illinois cases relating to all the subjects of Gray's fourth volume of cases and of the subjects of the statute of limitations and prescription in the third volume. On the latter subject, for instance, there were no less than 375 cases in Illinois. Most of these arose in respect to three special seven-year statutes of limitations. They presented some extremely interesting and puzzling questions. The subject of dedication in the third volume one of my students looked up fully under my direction a few years ago. He found 164 Illinois cases. They illustrated every phase of the subject, statutory and otherwise. I doubt very much if a man

giving one-half of his whole time to the work could check up the Illinois cases covering the subjects of all of Gray's Cases in less than ten or twelve years. Practically, I don't think it ever will be done by any one in practice in the ordinary sense. What person who has any "practice," as that term is ordinarily used, can devote to such work one-half of his time, or even less, for the first ten or twelve years from the time of his graduation?

I believe that the subsection of the case-books in some of the courses other than those on Property to an experiment and test similar to that I have applied to Mr. Gray's case-books would establish the same defect in the Harvard Law School case-books as a whole as that which exists in Gray's Cases. I do not believe it possible that the gap between the case-books on Evidence, Torts, Agency, Contracts, Trusts, Corporations, Equity Jurisdiction, Bills and Notes, and Criminal Law, and the present state of the Illinois law on those subjects is any less than that between Gray's Cases and the Illinois law. In fact, whenever I have had occasion to prepare an argument on any point of law dealt with at any length in any of the Harvard Law School case-books, I have found the whole subject fully dealt with and often settled for good or ill in the Illinois cases. I recall the following four striking instances where this was true: where the question was one of the right of a person not a party to a contract to sue upon it;¹ where the problem was under what circumstances a master owes a duty to the servant to use due care; where the question was as to the duty of a landowner to trespassers, licensees, and invited persons, including also the doctrine of allurements to children; and where the question was as to the sufficiency of the defense of right to possession where the one entitled to possession of land enters thereon, using no more force than is necessary.² If one-half of one's time for ten or twelve years is not too much in which to check up Gray's six volumes of Cases on Property, one might easily assign as much time again to the same treatment of the Illinois cases dealing with the subject-matter of the other case-books studied in law schools using the Harvard Law School case-books.

Finally, I believe that what is true here in Illinois is equally true in such states as New York, Pennsylvania, Massachusetts, Missouri, and Ohio, and very likely also in Wisconsin, California, Alabama, Georgia, Iowa, and Connecticut. In short, in the older, larger, and

¹ Liability of Water Companies for Fire Losses, 3 Mich. L. Rev. 508-511.

² Kales, Future Interests in Illinois, §§ 46-59.

more important jurisdictions we are facing a condition where the Harvard Law School case-book no longer turns out its graduates well equipped for actual practice at the bar. Nor is the Harvard Law School case-book graduate who has mastered his subjects able, in any reasonable time or under any average or usual conditions, to check up the results derived from his case-books with the law of the particular jurisdiction where he may practice.

If the Harvard Law School case-book is open today to the objections which I have voiced, then the strength of those objections is increasing every day, for the conditions which make them serious are growing with incredible swiftness. In the 1870's, for instance, the defect to which I have called attention may have been almost wholly non-existent. The comparative fewness of volumes of reports in different jurisdictions of the United States necessarily meant that the law of no one single jurisdiction came near being complete in itself. Almost everywhere the process going on was the express incorporation of rules of law by reference constantly to the English cases and cases from other jurisdictions. There was at that time, perhaps more nearly than at any time since, what may have been called a body of American law, *i. e.*, rules of the common law which all the states together adopted, and all alike were apt to follow, but which no one state had wholly applied in the reported cases. Those conditions dictated the present character of the Harvard Law School case-book. That they have gone by for many states needs no demonstration.¹ That they are rapidly disappearing for other states every decade will testify. With the passing of these conditions must pass the Harvard Law School case-book in its present form.

The probable length of time and the amount of labor required by the Harvard Law School case-book graduate to put himself in touch with the local law of one of the selected jurisdictions in the subjects touched upon in the case-books is of course a complete answer to the position which I have heard assumed in favor of the

¹ "Fifty years ago thirty-six per cent of the cases cited by the Court of Appeals of New York were from other jurisdictions, and twenty-two per cent were English. Today but seventeen per cent are from without New York, and over one-third of these have to do with constitutional law and bankruptcy (the greater number being federal decisions). A like showing may be made for any jurisdiction. One court has said recently (*Phoenix Ins. Co. v. Zlotcky*, 66 Neb. 584): 'Every court in the course of time develops peculiar doctrines with respect to which it differs from others of co-ordinate jurisdiction. Where these peculiar doctrines work no harm, certainty and consistency are no less important than agreement with other courts.'" (Professor Roscoe Pound in 2 Ill. L. Rev. 186.)

present case-book,—that it simply gives a foundation of general principles, leaving it to the student in practice to ascertain the local law. Of what use is a pretentious foundation of principles if the opportunity to make it professionally and commercially available in connection with the local law is denied the student? It is a pretty sad valedictory to the student graduating to say: "We have given you a splendid foundation, but it is commercially and professionally of little account except as you by your own efforts compile each of fifteen case-books from the decisions contained in from three hundred to five hundred volumes of reports of the jurisdiction where you practice. Eight men of unusual talent and industry working together under favorable circumstances, in a space of ten or fifteen years, have been able to put out thirty volumes of such cases, or an average of four volumes each, so that the task before you is probably impossible if you have anything else to do. But you must struggle with this difficulty as best you can. We cannot change because the case-books have been made after the present plan; the present majority approves them, and that ends the matter for us."

What, then, shall be done?

The proposal now made is that the subject-matter of the case-book be so altered that it shall present a true picture of the present state of the law in a particular jurisdiction—for example, Illinois,—with the same fidelity that it now gives us a correct understanding of the law of England prior to modern statutory changes, or of the law of that ideal jurisdiction which the compiler of the present Harvard Law School case-book has made for himself.

Let me hasten to say that this proposed change does not mean that the cases which indicate the historical development of English law are to be omitted, or that the great English cases which are the historical landmarks of the law are to be dispensed with. These we have in common with all jurisdictions where the law is based upon the common law. I mean only that the case-books shall be revised along some such lines as these: after retaining the historical and introductory matter of the different topics, there shall follow the cases which show what the English law was, with this difference, however,—if there are Illinois cases which have incorporated the rule of the English law and made it part of the Illinois law, let us have the Illinois case for specific and minute study. Let the English cases and cases from other jurisdictions be put into a footnote. If the Illinois cases depart from the well-

known rule of the English cases, as they do for instance in regard to the alienability of contingent remainders, we should have, perhaps, after the insertion of an English case, the Illinois cases departing from it. In short, the aim should be to insert into the case-book for minute study by the student and the teacher all the decisive cases for or against the incorporation of the principles of the English law.

No doubt, in carrying out this aim of giving the student a correct understanding of the origin and present status of the rules of law in Illinois, some topics — as, for instance, the construction of Section 10 of the Statute of Frauds — may be entirely omitted because Illinois has no such statute. On the other hand, I am not sure that some old subjects might not be resurrected. I notice, for instance, that in the second edition of Gray's Cases on Property, Volume I., the subject of attornment, as treated in the modern cases, is entirely neglected. In Illinois this topic might very properly be restored because of the existence of at least two stimulating and instructive cases.¹ No doubt some new topics will be found which were no part of the English law — as, for instance, the statutory estates in place of an estate tail. Such topics can usually be dealt with fully in the Illinois cases alone. Many special Illinois statutes must be inserted for study — as, for instance, the seven-year statutes of limitation. When the Illinois statute follows a well-known English act — as, for instance, the Statute of Frauds relating to the making and revocation of wills — the Illinois statute and the decisions under it will be inserted for minute study. As for decisions from other jurisdictions, it is not at all inconsistent with the proposed change that they be inserted. They are of course appropriate where they fill out an untouched point. Where they reveal a different rule from that which appears to be in force in Illinois, they would probably more naturally appear in a footnote.

At all events, you are bound to have a case-book. Whether or not it is sufficiently unlike the present case-books in subject-matter to make it worth the trouble of reconstructing will depend upon the number of reported cases in the particular jurisdiction. The case-book in its present form might well be regarded as in the most excellent form possible to indicate the probable state of the law in North Dakota, which has only 14 volumes of reports. If, however, a case-book be constructed for the purpose of presenting the pre-

¹ *Fisher v. Deering*, 60 Ill. 114; *Barnes v. No. Trust Co.*, 169 Ill. 112.

cise state of the law in New York, where they have upwards of 800 volumes of reported cases, and where, as is well known, the departures from the common law are legion, or of Pennsylvania with about 422 volumes of reports, or of Illinois with its 350 volumes of reported cases, it can hardly be doubted that its exact subject-matter will be very different from that of the present Harvard Law School case-book.

In presenting the general principle of these proposed changes it is unnecessary to be more specific as to its application. Every one who has tried to construct a case-book must know what nice matters of judgment are involved in determining what to leave out and what to put in. These same difficulties would confront the reviser of the present case-books on the lines suggested. Two of us, therefore, with precisely the same aim, might differ in the details of carrying it out. We might arrive at different conclusions as to just the proper proportion of Illinois cases which should go into the text, and when it was better to put a case on the same point from some other jurisdiction in the text and the Illinois case in the note. My own inclination would be to go very far in inserting the Illinois case in the text. If an English case, while not a great landmark in the law, was well reasoned, and the Illinois opinion very badly reasoned,¹ I should be inclined to put in the Illinois case so that the opinion of the Illinois court could be directly subjected to criticism and the criticism be known and appreciated by class after class of students. Such a step, while not to be laid down dogmatically for all cases, is the logical application of the fundamental purpose of the change proposed, *vis.*, to throw into high relief the actual language and decisions of our own court for analysis and criticism, so that the state of the law in the given jurisdiction may be most accurately known and understood in the terms of its own decisions. Cases from England and other states may be used because they are the best reasoned and show what the Illinois law

¹ A good example of this occurs in regard to the case of *Dean v. Walker*, 107 Ill. 540. From the Illinois cases a fairly complete exposition of the right of a third person to sue upon a contract to which he is not a party could be made up. They establish the doctrine of *Lawrence v. Fox* (20 N. Y. 268), but they seem to deny the sole beneficiary theory. (See 3 Mich. L. Rev. 508-511.) *Dean v. Walker* held, however, that if A, a mortgagor, assigned to B, who does not assume to pay the mortgage, and B assigns to C, who does assume to pay the mortgage, then the mortgagee can sue C. The result is reached without any reasoning at all. Would you insert this case in the text or would you put in one of the New York cases the other way, or a case from some other state in accord with *Dean v. Walker*, but with some attempt at reasoning?

is, or ought to be, but this must be done in complete subordination to the principal object of presenting a perfect picture of the then state of the local law.

I have never heard but two objections raised to the change proposed. One relates to dollars and cents, and the other to an educational ideal. The first is founded upon the fear of a loss of tuition fees; the second upon the fear of a departure from the best educational ideal. Neither objection will stand scrutiny.

There need be no fear that what I propose will be a departure from the best educational ideal. I venture to assert that the change advocated will be a step in fulfilment of a better educational ideal than now exists. It will give up no essential educational effect which is now produced, and it will add a most important educational effect which is now lacking for one practicing in one of the older and more important jurisdictions.

The great educational value of the Harvard Law School case-book which arises from analyzing cases and mastering the subject through cases, is not lost. The educational value of observing the historical development of the law and of comparing different rules in force in different jurisdictions need not be lost. The plan proposed does not contemplate the slighting of either history or comparative law, but simply that these subjects be subordinated to the principal aim of ascertaining the present state of the law of a given jurisdiction. History of the law is necessary to indicate its origin or foundation in every jurisdiction. The study of the development of the law in other jurisdictions in proper subordination is equally wise as indicating uncertainty on the point and the possibility of a bad rule in the principal jurisdiction being changed. The difference between what I propose and the present arrangement of the case-book is one of emphasis. I think it would be a fatal admission by those who disagree with me to contend that strictly professional knowledge should be subordinated to general education and culture, or to history and the study of comparative law.

The change which I propose not only will not lose any essential educational feature now possessed by the present case-book, but will produce a degree of efficiency and exact knowledge which is now denied to the student of the case-book, and which he can never attain by his own efforts. With the new case-books in full operation a graduate from the law school will not have to look up departures and changes from the system which he has learned.

He will not have to determine what is good, bad, and uncertain in the jurisdiction in which he practices. He will not have to relearn all the propositions which he recognizes as law in the terms of the decisions of a given jurisdiction and tabulate the topics and points that still remain untouched. Instead of the prospect of many years of labor in doing a small part only of such work, upon graduation he knows one system at least as well as he now knows the law of that ideal jurisdiction where the only reports are the Harvard Law School case-books, and the only court is the body of men who instruct the class from them. He has the benefit of the labor of others which he could not possibly duplicate in a lifetime. The scholar who has mastered the common law and the men who have become specialists in certain branches of the law of a given jurisdiction contribute the selected materials for his education. He will come before the courts of his state with somewhat the same grasp of his subjects that one of the late Professor Thayer's pupils might have had who appeared before the United States Supreme Court in a case involving the Commerce Clause. Who would not exchange such an equipment for practice in New York, obtained under the guidance of such men as now constitute the faculty of any first-class law school using the Harvard Law School case-books, for that which is now offered by these same faculties? What recent case-book graduate would not exchange his present incapacity in the courts of the jurisdiction where he begins practicing, for an efficiency approximating that which he would have if upon graduation he began to practice before a court, the divisions of which were presided over by his teachers, and where the reports of authority were the case-books he had studied?

It is true that such a change as that proposed once taken openly will alienate from a school all men who expect to practice in any other jurisdiction than the one where the school is situated. But if I am correct in saying that the change suggested will produce greater efficiency, which will be not merely temporary, but permanent — if it will furnish a training which the present Harvard Law School case-book graduate cannot duplicate — such a school will at once attract every man studying for practice at the bar in that state. In the older and more important jurisdictions this holds out an opportunity for an enrolment of students which ought to satisfy any school. In New York, for instance, during the last four years an average of 986 new candidates for admission to the bar have presented themselves each year. In Pennsylvania the average

number of new applications in the same period has been 124; in Illinois, 253; in Massachusetts, 288; in Ohio, 195.¹ Furthermore, in all these jurisdictions there are law schools in excellent standing where already a very large percentage of students expect to practice in the state where the school is situated. In Columbia I am informed that about 60 per cent of the graduating classes expect to practice in New York;² at Cornell, out of a graduating class of 47, 40 or 87 per cent expect to practice in New York; at the University of Pennsylvania, with a graduating class of 61 in 1906, only 3, or 5 per cent, are now practicing outside of the State of Pennsylvania, the rest are members of the Pennsylvania bar, and this, I am informed, represents a fair average in recent years; at the law school of the University of Illinois 80 per cent expect to practice in Illinois; at Northwestern University Law School 75 per cent; at the Boston University Law School 85 per cent of those graduating in June, 1907, expect to practice in Massachusetts; at the Cincinnati Law School 90 per cent of the students expect to practice in Ohio; at the law department of the University of Missouri 95 per cent of the whole enrolment expect to practice in Missouri. I would confidently predict that a school in New York, Pennsylvania, Illinois, Massachusetts, Ohio, or Missouri, taking the stand which I describe and carrying it out, would lose in no instance more than 20 per cent of its present number of students, and in some instances as few as 5 per cent, and would attract a very considerably larger number than it lost. I should confidently expect

¹ The State Board of Bar Examiners for New York wrote me on October 10, 1907, that: "Since April, 1902, to date, there have been 5425 *new* applications filed for admission to the bar to the State Board of Bar Examiners in this state. That does not take into consideration those admitted on motion." I was able to obtain from the Board of Bar Examiners in the several states of Pennsylvania, Illinois, Massachusetts, and Ohio, the average total number of candidates applying each year for the last four years. These figures are as follows: Pennsylvania, 206; Illinois, 422; Massachusetts, 480; Ohio, 325. In only one instance did I receive even an estimate of what proportion of these totals represented new candidates, excluding those who had taken the bar examination before and failed. The Chairman of the Massachusetts Board of Bar Examiners estimated that three-fifths of the total number of applicants each year were new candidates. Using that as a basis for calculation, I have in each of the states mentioned taken three-fifths of the total average number of candidates each year as representing an approximate number of new candidates. Considering the reputed high standard of the Massachusetts Bar examinations, I believe that the allowance of three-fifths of the total number of candidates applying as representing the new candidates is probably considerably below the actual facts.

² This is Professor Kirchwey's figure. He says that 20 per cent more acquire a temporary residence for the purpose of taking the New York bar examinations.

it ultimately to obtain a very large percentage of the total average number of persons applying for admission to the bar in the particular jurisdiction where it was situated.

In drawing this paper to a close let me briefly call attention to two general considerations in support of the proposals which I have made.

In the first place, the very reasoning which originally supported the Harvard Law School case-book against the text-book now requires the change in that case-book which I advocate. One of the two essential ideas of Professor Langdell seems to have been that the law was to be studied by going to the original sources. President Eliot, in speaking of Professor Langdell, said :

"He told me that law was a science. I was quite prepared to believe it. He told me that the way to study a science was to go to the *original sources*. I knew that was true. . . ."

Professor Wambaugh speaks more fully of this idea : ¹

"He [Langdell] knew — as, indeed, every law student learns in the first week of his studies — that the existence and limits of a rule of law must be proved finally, not by a text-book, but by the reported decisions of courts. He knew that when a lawyer has occasion to test a rule of law he searches for those decisions. Professor Langdell determined that the student should be trained to use those *original authorities*. . . ."

I do not really know precisely what ought to have been considered *the* law when Langdell compiled his first case-book, or what were the original sources of that law, but I do know that today, in the older and more important jurisdictions, *the* law is the body of rules which are enforced in that jurisdiction, and the original sources of that law are not to be found in the English reports, or in the reports of other states, or even in the mixture which the present Harvard Law School case-book contains. They are to be found in the reports of the given jurisdiction just as truly and just as clearly as the sources of what Professor Langdell in 1871 called the common law were to be found for the most part in the English cases. The reports in each of such jurisdictions have become the principal, and for a very large body of rules the only, original sources of the law of that jurisdiction. Why, then, should not the student who expects to practice in such a jurisdiction be trained to use those original authorities and to derive from them by crit-

¹ Professor Langdell — A View of His Career, 20 HARV. L. REV. 2.

icism and comparison the general propositions of law there in force?

Secondly, the need of a development and perfection of our local law similar to that which the local law of England has enjoyed, furnishes an argument in favor of the change which I have suggested.

There is no necessity in these days of American idolatry of the common law to dwell upon the development and perfection to which the local common law of England has been brought. Rather do we need to observe the means by which this acknowledged superiority was accomplished. It is not too much to say that without the most exaggerated attention to the common law as a local and insular system, apart from, if not actually opposed to, the systems of law developed on the Continent, it would never have reached the development and perfection which has made it the foundation of the law of the English-speaking world. If we may trust Professor Maitland, it was to this attention to the barbarisms of local and insular customs that it owes its existence as a unique and worthy system of law.¹ In the middle of the sixteenth century the life of the ancient common law was by no means lusterless. It was menaced by the introduction of the academically taught Roman law of the Continent. Such a reception was prevented, and the common law triumphed at a critical moment of its history, because it had been reduced to writing in the Year Books, because it was mastered, taught, and practiced by the members of the Inns of Court, and because out of the body of those who knew and administered it there sprang such teachers and writers as Littleton, Fortescue, Robert Rede, Thomas More, Edward Coke, and Francis Bacon. The triumph of the common law once assured, its perfection as a system it undoubtedly owed to the fact that through generations it had been slowly wrought out by an unbroken and highly organized body of specialists who continually brought to the solution of legal problems — either in argument at the bar or in judgments from the bench — a very high degree of expertness and learning respecting a local and insular system in actual force and operation. To such a degree has the organization of the bar in England now been carried that not only is the business of the taking care of clients entirely separated from the profession of handling litigation, but each has its subdivisions. The profession of hand-

¹ *English Law and the Renaissance*, reprinted in *1 Select Essays in Anglo-American Legal History*, 168-207.

ling litigation is divided into the law and chancery bars, and it is the practice of all but the leaders to devote themselves to the work in a particular court before a particular judge.¹ When the English text-books, ancient and modern, which are revered and applauded as the work of masters of the common law are observed, it is found that they consider with laborious minuteness, sometimes on narrow special topics, only the decisions of the local jurisdiction, criticizing what is bad or doubtful, and bringing to a coherent whole that which is consistent and harmonious with the premises upon which the local system is based. Of course, the Englishman who studied for the bar always devoted himself primarily to the mastery of the local law. Formerly no doubt this was accomplished by the reading of text-books and the consideration of cases to be found in the English reports. Now, however, that the teaching of law by case-books has been accepted to some extent in England we find the case-books in use composed practically wholly of English cases, — cases which purport to give to the student a picture of the presently existing state of the English local law. In short, in England for centuries, students, lawyers, teachers, text-book writers and judges, and even social philosophers have united in the bringing of a single system of law administered by the courts of a single central jurisdiction to perfection. No wonder a great result has been achieved.

Is the local law of our American jurisdictions to be denied the development and perfection which must come from an attention to it similar to that which the English local law has received for centuries? The life of the local law in the various states of the Union is strong and vigorous for the same reasons that the common law triumphed over the Roman law in the sixteenth century. It is to be found in the printed reports of the local supreme and appellate courts. A body of local lawyers and judges adheres to what the courts of the particular jurisdiction declare to be the rule. The local law is pushing out the academically taught common law, even as the common law under its masters, from Littleton to Coke and Bacon, prevented the reception of the academically taught Roman law. It cannot be said, however, that the local law is being brought to perfection. In fact, the signs are ominous of a lack of intelligent and healthy development. We find our supreme courts and lawyers apparently unable to know and follow the decisions of their par-

¹ A Philadelphia Lawyer in the London Courts, Part I, by Thomas Leaming, 18 Green Bag 444.

ticular jurisdictions.¹ The duplication of decisions upon points of law already fully settled and in many instances elementary, is inordinate.² We see in consequence a resort to hasty and immature codes as a relief from uncertainty and the entanglements of a system but ill digested. The bringing of the law in the older and more important states to any perfection at all approaching that which the common law has attained, requires the same concentration upon its outline and development as that which served to develop and perfect the common law. The details of our local system must be studied as we have in the past studied the common law. We have inherited a great system of law, but it will give place to such false gods as the ill-advised code, or go the way of the spendthrift's inheritance, unless it receives, in each place where it has taken root, most minute and painstaking cultivation. For this development of the local law we need teachers who have mastered it, who know it with all its inconsistencies, all its barbarisms and back-slidings, and who can view it in the light of its historical

¹ The recent case of *Ortmeyer v. Elcock*, 225 Ill. 342, 2 Ill. L. Rev. 45, is a striking example of this. There the court construed a remainder after a life estate to A or his heirs, as giving A an indefeasible fee simple, disregarding *Ebey v. Adams*, 135 Ill. 80, an excellent case to the contrary. So *Kohtz v. Eldred*, 208 Ill. 60, holding that "die without issue" means die without issue in the lifetime of the testator and that only, runs *contra* to *Thomas v. Miller*, 161 Ill. 60; *Smith v. Kimbell*, 153 Ill. 368, 377, 378; *Summers v. Smith*, 127 Ill. 645, 649. Among the Illinois cases the number of examples of this sort could be very greatly increased without much trouble. (See *Hood v. Thorp*, 228 Ill. 244.) Professor Wigmore has furnished me at a moment's notice with the following examples that have recently come to his attention: 1906, *Earley v. Winn*, 109 N. W. 633 (Wis.), (slander; the ruling is apparently inconsistent with *Talmadge v. Baker*, 1868, 22 Wis. 625, which is not cited.) 1900, *People v. Casey*, 124 Mich. 279, 82 N. W. 883 (on a point which had been settled by at least twelve Michigan cases between 1864 and 1900, the court cites four of these and eleven from other states). 1906, *Dielman v. McDanel*, 78 N. E. 591 (Ill.) (hereditary insanity; the court cites rulings from other jurisdictions but ignores the following three from its own records: 1862, *Snow v. Benton*, 28 Ill. 306; 1874, *Meeker v. Meeker*, 75 Ill. 260, 270; 1883, *Upstone v. People*, 109 Ill. 169). 1905, *Shockley v. Tucker*, 127 Ia. 456, 103 N. W. 360 (negligence of a physician; *Lacy v. Kossuth Co.*, 1898, 106 Ia. 16, 75 N. W. 689, was not cited, though involving the same question). 1906, *Murray v. Dickens*, 42 So. 1031 (Ala.), (account-books; the opinion cites an encyclopedia, and ignores the recent contrary case of *Snow, etc. Co. v. Loveman*, 131 Ala. 221). 1903, *Dovey v. Lam*, 117 Ky. 19, 77 S. W. 383 (testimony of a co-defendant's wife; cases cited from Idaho and Indiana, but the two preceding ones in this state ignored).

² The best example of this that I recall in the Illinois cases is the way the doctrine of *Lawrence v. Fox*, 20 N. Y. 268, has been again and again upheld. The objection that the third party could not sue upon the contract goes to the propriety of the plaintiff's suit and is not one which arises merely incidentally. Yet we have in Illinois at least thirty-two reported cases applying the rule of that case. See 3 Mich. L. Rev. 510, n. 73.

antecedents and the contemporary development of comparative systems. In view of the lack of organization in our bar, I believe that the perfection of the knowledge of the local law lies in the hands of our law schools. To their faculties must be entrusted the work of preparing the new case-books which will link us to the past, keep us in touch with what is best about us, and yet bring a great white light to bear upon the system of law developed in the given jurisdiction. To them will fall the lot of producing a local bar as expert in the law of the given jurisdiction in the subjects taught as the present Harvard Law School case-book student is in the law of that ideal jurisdiction where the Harvard Law School case-books are the only authorities and his instructors are the only judges.

In conclusion let me remind you that it is almost axiomatic in our present-day creed of life and thought that the current truths are by no means immutable. In fact, paradoxical as it may seem, the "truth" that we most universally acquiesce in just now is that there is no such thing as finality. There is nothing so sure as change. As Ibsen picturesquely put it: "Truths are by no means the wiry methuselahs some people think them. A normally constituted truth lives—let us say—as a rule, seventeen or eighteen years; at the outside twenty; seldom longer. And truths so stricken in years are always shockingly thin." Nothing within the range of my knowledge more strikingly illustrates this generalization than the history of public opinion as it has found expression in English legislation of the nineteenth century. As Professor Dicey tells us, we have first the period of "Old Toryism" led by Lord Eldon. This came to an end as a predominant force in the 1830's. Then "Benthamite Individualism" gained the ascendancy till the 70's. That in turn has given way to the "collectivist" or "socialistic" movement of the latter part of the century. In precisely the same way we may premise that the text-book system of teaching law has gone by forever. It still lingers where the light has failed to penetrate. Perhaps some survivor of its golden age, who has, as had Lord Eldon after the passage of the Reform Bill of 1833 became a certainty, lived far beyond his time, still cries out for it. But it is gone. In its place has come Langdell's great innovation. Year by year it has made converts and gained prestige until, so long ago as 1890, its complete triumph has been assured. So overwhelming has been its success, so invincible its progress, that in obedience to the law of evolution and change it is not *a priori* unlikely that at the very moment of its great triumph

the beginning of its decline in its present form should make its appearance.

I shall say one word further so that there may be no misunderstanding. I have had occasion to assert that the present Harvard Law School case-book is seriously defective. In making that criticism I have not attempted to soften the force of my remarks. Rather have I done my utmost, without being intemperate or unfair, to make my criticism felt. Do not assume, however, that because I believe that the time is at hand for a radical step in the evolution of the Harvard Law School case-book, I will yield to any one in the honor in which I hold those men who developed the present method of teaching law as a science and by cases, or that I cease to recognize my personal debt and the debt of the profession at large to those men and to the law school which stands as a monument to all they have done. But I am not satisfied with doing them honor. I wish their ideas more completely to predominate with the bench and bar of the various states of the Union. I believe that the step which I suggest, undertaken by those who have been able and loyal supporters of the Harvard Law School case-books and other case-books of equal merit, will spread among lawyers and judges the influence and ideas of our masters to an extent which has hitherto been impossible and which never can be equalled so long as case-books constructed upon the present lines are used. The Harvard Law School case-books and others constructed upon similar lines already own the best law schools everywhere. In order that they may dominate the bench and bar in the same degree, I suggest that they must be revised along the lines which I propose.

Albert Martin Kales.

CHICAGO.

NOTE. — The HARVARD LAW REVIEW asks a comment on Professor Kales' article. As the article is written from a purely practical point of view, the comment also will be practical.

It ought to be enough to point out that the lawyers of this country are really not inefficient, and that all of them, whether educated with Harvard case-books or other case-books or treatises, have been trained according to the theory that American law is essentially one science and that the peculiarities of local decision are not to be emphasized for students. Nor has this view been adopted thoughtlessly. In 1803 appeared Tucker's Virginia Blackstone, and in 1831 Reed's Pennsylvania Blackstone; and these have not been the only elementary books on local law; but the books named, and all similar treatises, have long been superseded by works of a national scope. There are many local books on Pleading and Practice, and a few on topics in the substantive law; but the local

books are in the hands of practitioners and not of students. It is unquestionable that the successful practitioner must be acquainted with local law; but it is impossible to agree with Professor Kales' allegation of the inefficiency of persons who have failed — as almost all have failed — to gain this useful knowledge as part of their elementary course of study.

Further, one must be permitted to believe that Professor Kales has overestimated the departures of local courts from the doctrines generally recognized. His specifications as to Illinois doctrines on Property do not seem to require a law school, even in Illinois, to make Illinois peculiarities the basis of the regular course of instruction. Doubtless, to some persons local peculiarities seem more numerous and more serious than to others; but an examination of various treatises and case-books, and of the local law of several states named by Professor Kales as probably having important peculiarities, makes it not unreasonable to believe that as to each branch of the law the gap between Harvard and Illinois — or any other state — may be bridged, for students' purposes, by a very few pages.

Again, that gap, such as it is, seems likely to be narrowed in Illinois, as in all other jurisdictions, by the desire for uniformity and by the growing knowledge of outside decisions. Professor Kales gives in a footnote instances wherein the courts of several states, and especially of Illinois, have ignored their own former decisions and have followed the decisions of other jurisdictions. Thanks to publishers, vast encouragement is given to the desire of practical lawyers to bring to the knowledge of courts the decisions of other jurisdictions and to discuss questions in the light of general law. Indeed, Professor Kales' proofs of the scanty respect which the Illinois Supreme Court gives to its own peculiar decisions, seem to show that when a lawyer wishes to know how that court will decide in the future, — which, of course, is really the problem that the practical lawyer encounters, — his attention should not be directed to peculiar Illinois cases, but should be directed to general treatises and to general collections of cases.

Finally, — to condense two practical considerations into one sentence, — the student really cannot predict where he will spend his professional life, and he knows that if he has appreciable success he will deal with business in all parts of the United States.

There are other practical reasons opposed to Professor Kales' suggestion that local law should be made the basis of the law school's regular work; but by this time it ought to be apparent that the real difficulty is the conflict of Professor Kales' suggestion with the history of law and with its probable future. Nor does Professor Kales' suggestion gain weight from his conception that, as all other persons concede the necessity of gaining acquaintance with local law, his plan differs in emphasis only. In his presentation of the educational value of local law he goes to such an extreme that he has no common ground, even by way of compromise, with those who hold the usual belief that, though local law should not be wholly ignored, the ordinary instruction in the law school should be based upon general law, and that the student's systematic work with local statutes and local decisions should be undertaken merely by way of a supplement upon completing each subject, or by way of a comprehensive review of the whole law just before or just after admission to the bar.

Eugene Wambaugh.

THE RELATION OF JUDICIAL DECISIONS TO THE LAW.

JUDGE-MADE law has been for centuries a fruitful topic for discussion and a subject of much controversy. Usually the expression is employed as a term of disapprobation to characterize a judicial decision or series of decisions which appears not to be properly or adequately based upon precedent, or which presents some new or unusual conception of legal rights and duties under particular circumstances. Indeed the idea quite generally prevails that such judge-made law is not properly law at all, but merely an erroneous interpretation of the existing law.

The commonly accepted view of the law, or the common law, as an abstract ideal, is that it is a complete body, existing from time immemorial, and therefore the same in every jurisdiction except in so far as it is altered by statute. This law is known or discovered by the judges. They interpret the law, and the reports of their decisions are authoritative evidence of it.

This doctrine was proclaimed by Blackstone.¹ It is upheld by Professor Beale, who says in his *Summary of the Conflict of Laws*:² "Wherever, therefore, there is a political society, there must be some complete body of law, which shall cover every event there happening;" and again,³ "Law once established continues until changed by some competent legislative power." It has been adopted by the Supreme Court of the United States in the case of *Swift v. Tyson*,⁴ followed by *Baltimore & Ohio R. R. Co. v. Baugh*.⁵ In the former case Mr. Justice Story expresses the opinion⁶ that:

"In the ordinary use of language it will hardly be contended that the decisions of courts constitute laws. They are, at most, only evidence of what the laws are, and are not of themselves laws. They are often re-examined, reversed, and qualified by the courts themselves, whenever they are found to be either defective or ill-founded, or otherwise incorrect."

As a corollary to this doctrine it follows that judges do not properly, in the exercise of their judicial functions, make new con-

¹ 1 Bl. Comm., 68.

⁴ 16 Pet. (U. S.) 1.

² § 7.

⁵ 149 U. S. 368.

³ § 9.

⁶ P. 18.

crete laws. They merely declare the old existing law as an abstract entity. Thus Blackstone says:¹ "The subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation." It also follows as a further corollary that all differences between judicial decisions must be due to some error made by the judges in their interpretation of the law.

This conception of the law is not, however, universally accepted, and I believe many of us cannot escape a feeling of dissatisfaction with its hard and fast conclusions. We are all acquainted with legal problems arising from the new relationships and wider experience which come with advance in civilization and greater complexity in human affairs, where there appears to be no solution which is absolutely and exclusively true, but on the contrary two opposing solutions seem to contain a measure of reason and truth. We are compelled to admit the force of the proposition that a judge confronted with such a problem, since he must decide the case in one way or the other, so far as his decision is an authoritative precedent, does and must make law. Accordingly, Austin, in his *Lectures on Jurisprudence*, has declared that a law may properly be made judicially, since, though the direct purpose of its author is the decision of a specific case, he may and indeed must, so far as his decision serves as a precedent, legislate substantially or in effect.²

The theory that law is a complete existing body discovered or interpreted by the courts is a natural result of the tendency or desire which impels every thinker to seek to form abstractions and to establish general principles by induction. Such abstractions, or legal fictions so-called, abound in the law. Inductive reasoning by itself, however, is only a part of the reasoning process by which the truth becomes known. Attractive generalities are dangerous and should be laboriously tested by the light of concrete experience.

Let us, therefore, apply some of the tests of common sense and ordinary experience to the legal fiction that law is an existing entity which is interpreted by the courts. We shall find, I think, that the law may well be viewed, not as a complete entity, but as incomplete and practical, differing in different communities, everywhere in process of growth, and continually affected and altered both by legislative enactments and by the making of judicial decisions.

¹ 1 Bl. Comm., 70.

² 2 Austin, *Jurisprudence*, Lecture 37.

In considering this subject in detail we shall be concerned with: first, the method of reaching a judicial decision; and secondly, the effect of such a decision.

SOURCES OF LAW.

Those influences to which a judge is properly subject in arriving at a decision in a particular case are generally named sources of law. They may be divided into four classes: statutes, positive rules of law, analogous decisions, and principles of public policy.

Statutes are enactments of the legislative branch of the government prescribing a certain definite rule of civil conduct. Being in the form of a rule they are expressed in terms which are general and broad, and must by a process of deductive reasoning be interpreted by the courts in order to determine the application of the rule to the particular case. While theoretically they are of conclusive authority upon the judges, their effect is largely controlled by the interpretation thus put upon them.

Positive rules of law are rules gathered by induction from previous reported decisions of the courts or perhaps originating in ancient custom. They resemble statutes in that they are reduced to a general or abstract form, but their interpretation and application are aided by the numerous existing decisions relating to them. Their authority is practically conclusive wherever they have originated or have been adopted. An example of a positive rule of law is the rule that a promise, to be legally binding, requires consideration.

Analogous decisions are to be distinguished from positive rules of law by the greater degree of their complexity. While the latter are simple in form, springing from a number or class of similar cases whereby all extraneous and peculiar circumstances are eliminated, the former are not reduced to simple rules, but with all their particular circumstances clinging to them are taken by the judges and treated by a process of comparison by analogy with the case before them for determination. This process is evidently the very process of abstraction by which in time a positive rule of law is built up. As authority, analogous decisions have of course great weight, though they may be overruled. Even in other jurisdictions they may have much persuasive force. The often cited case of *Allen v. Flood*¹ is an excellent illustration of a decision which is frequently treated by the process of comparison by analogy.

¹ [1898] A. C. 1.

Principles of public policy are difficult of definition. In effect they are broad and indefinite principles, rather than rules, of civil conduct which tend towards the public good. Some — a heritage from the past — are expressed in the crystallized form of legal maxims, such, for example, as the maxim *Sic utere tuo ut alienum non laedas*. Others may be gathered from the opinions of judges or the writings of legal authors. In general they depend upon and vary with the character of the people in the community and their needs and resources. So far as they have been expressed they are not authoritative and have no weight beyond the natural weight of reasonableness by which they appeal to the minds of the judges. Consequently, in a particular case the opinions of judges upon a principle of public policy may and very frequently do differ. Indeed the principles themselves are often contradictory.

This attribute of conflict between the principles themselves marks a fundamental and essential difference between *principles* of public policy and the authoritative *rules* of law which, as we have classified them, constitute the three first sources of law. Rules of law, whether propounded by the legislature directly or by the courts indirectly, and whether abstract in form or concrete decisions, are definite, and cannot logically contain incongruities or conflict with one another. Thus, in a given case a particular statute or positive rule of law must either apply or not apply, and a particular analogy must be followed or distinguished. Principles of public policy, on the other hand, are indefinite and uncertain of application, and often do conflict with one another.

Whenever two such conflicting principles have weight, under a particular set of circumstances before the court, it becomes necessary for the judge, in determining the legal rights and duties of the parties before him, to solve the conflict, to the extent to which the principles are involved in the circumstances of that case.

A clear appreciation of the fact of this conflict between principles with which a judge must deal is shown by Lord Bowen in the celebrated opinion rendered by him in the case of *Mogul S. S. v. McGregor*,¹ in which decision the right was recognized to compete with others in trade by the use of methods which might reasonably be expected to cause them serious injury. He says :

“ We are presented in this case with an apparent conflict or antinomy between two rights that are equally regarded by the law — the right of the

¹ 23 Q. B. D. 598.

plaintiffs to be protected in the legitimate exercise of their trade, and the right of the defendants to carry on their business as seems best to them, provided they commit no wrong to others. The plaintiffs complain that the defendants have crossed the line which the common law permits ; and inasmuch as for the purposes of the present case we are to assume some possible damage to the plaintiffs, the real question to be decided is whether, on such an assumption, the defendants in the conduct of their commercial affairs have done anything that is unjustifiable in law."

The conflicting principles involved in that case are the right of free competition in trade and the duty not to use methods which will injure one's competitors. They are merely special instances of the two great opposing principles which it is the object of the law and social organization in general to regulate ; namely, the right to conduct one's affairs as one will, and the duty so to act as not to injure another. The solution in particular cases of the conflict between these principles is generally in the nature of a compromise, whereby the legal rights of the parties are defined and limited by some standard of reasonable conduct, and by the court's decision the act under consideration is determined to have been either justifiable or unjustifiable in law. Each solution is, however, evidently merely a partial or particular solution. Between the general principles themselves the conflict is eternal, and no solution can be complete so long as our relations with our fellow-men continue to present new problems.

When a judge has before him the task of making a decision upon particular facts, the first question to be determined is whether there is some statute, positive rule of law, or previous authoritative decision which is exactly applicable. If so, he goes no further, except in the rare cases where a decision is overruled because it is itself founded on clear error or is opposed to certain principles of public policy. If, however, no statute or positive rule of law is exactly applicable and previous decisions can be distinguished, there remain two sources which may influence the judge in his decision. These are analogous decisions and public policy. Where the analogy with a previous decision is close, a judge will be guided more by the analogy and less by an independent consideration of the principles of public policy. Where, however, there is no close analogy, and especially where two more or less remote analogies lead to opposite results, a judge is driven to a consideration of those principles, since he must on some ground render a decision.

It is, therefore, not surprising that there should be differences in the decisions of the courts of various jurisdictions not due to legislative enactment. Wide differences are to be found in the sources of law aside from those created by statute. Principles of public policy vary largely in different communities, and thereby their courts are properly influenced in cases where public policy must be considered to make decisions which are at variance with each other. Differences in judicial decisions as they occur make further variations in the sources of law in so far as they affect the positive rules of law or create different analogies. Thus there is always a tendency towards heterogeneity in the decisions of different courts. Of course errors in reasoning are sometimes made. Statutes and positive rules of law are wrongly applied, and analogies are wrongly followed or disregarded. It must be reasonably clear, however, that as a whole the diversity is not due to errors, but is a result of different ideas as to what best meets the needs of the people of the various communities in which the decisions originate.

EFFECT OF JUDICIAL DECISION.

The effect of a decision by the court is two-fold: first, it determines the controversy between the parties and thereby establishes their legal rights and duties, making the law which governs the case; secondly, it makes law so far as it serves as an authority for future decisions.

1. By the decision the legal rights and duties of the parties, with respect to the relationship between them upon which the cause of action was founded, are for the first time determined and declared, so that as a result damages may be awarded as compensation for the infringement of a legal right, or further infringement enjoined.

This plain proposition supplies the answer to a plausible argument made by those who hold that the courts simply interpret the law. They point to the fact that there is of necessity a gap between the time when the cause of action arises and the time when the court's decision is rendered, and say that if the court which decides the case makes the law which governs it, then the act which forms the basis of the cause of action is not governed by existing law, fixing the legal relationship of the parties at the time of its commission, but is wholly dependent for its legal effect upon the subsequent determination of the judges.

We must agree that the conclusion is sound. It is not, however, a *reductio ad absurdum*. The idea, it is true, is well nurtured by tradition that legal rights and duties in relation to a certain act are legally established at the time of the commission of the act, — that one having an accurate knowledge must know what acts are justifiable in law. This theory, however, is simply another legal fiction which is not supported by experience. It is, in fact, only when the court has passed upon the question that the character of legal rights is finally determined, and no previous opinion, no matter how eminent the source, can have weight if it be contrary to the court's decision.

In reality it is simply the sources of law, as we have already described them, which exist at the time of the act in controversy, to which sources the contestants may subsequently appeal when they are before the court. From those sources any one may form an opinion as to the law governing the legal relationship of the parties, but the only authoritative opinion is that expressed by the court before whom the case goes for judgment and by whom the legal rights of the parties are determined and protected. By the rendering of its decision the law governing the case in fact then for the first time comes into existence, as an edict or promulgation by the state through its court, and no one can foretell with entire certainty what that law will be.

2. By the decision the court makes law so far as its judgment serves as an authority for future decisions.

That the decision becomes upon its rendition a part of what we have called the sources of law is perfectly clear and uncontrovertible. It may operate either to affect some previous positive rule of law (one of the four sources as we have defined them), to assist in the formation of a new positive rule of law, or to create a new analogy (another of the four sources). Whether the decision thereby becomes law which is made by the court may depend somewhat upon our definition of the term "law." Let us, then, now undertake to form a definition of a law which shall correspond with our conception of its nature and attributes.

When we speak of laws we have in mind authoritative rules laid down by the government under which we live, governing our civil conduct as individual members of the state and fixing our legal rights and duties. Their most essential attribute, perhaps, is their authoritativeness or enforceability. Statutes are a notable example of what we mean by laws, but they do not include all laws. The

rule that one man owes another the duty to use reasonable care not to injure him, though not statutory, is also a law to which each person is subject. In fact, any rule which is regarded by the courts as authoritative comes within our conception of a law.

Those rules, however, which have a compelling force and effect upon the courts are evidently simply statutes and judicial precedents, which are coincident with the first three sources of law as before described, that is, the rules of law as we have called them, as distinguished from principles of public policy. All these rules of law are to a marked degree authoritative, while on the other hand principles of public policy have only a persuasive force, so far as they appeal to the reason of the court.

The three rules of law, as we have seen, consist of statutes, which originate directly with the legislature, and positive rules of law and analogous decisions, both of which are more or less direct emanations from the courts.

I therefore suggest as a definition that a law is a rule of civil conduct declared either directly by the legislative branch of the government as a statute, or indirectly by the judicial branch as a necessary result of judicial decisions. This definition I submit is sound in theory, and is also in accord with our ordinary idea of the nature of a law.

According to this definition the court by every decision to some extent makes law, since thereby some pre-existing positive rule of law is amplified or qualified, some new one is formed, or some new analogy is created.

CONCLUSION.

Unless there be some hidden error in our reasoning or some false application of our common experience, we must conclude that by the rendering of judicial decisions the courts do make law, both in so far as they declare what in a certain situation are the legal rights and duties of the parties before them, thereby promulgating the law which is applicable to the particular case, and in so far as their decisions operate as sources of law, which serve as precedents for subsequent decisions. In the latter aspect judicial decisions become laws as we have defined them, while in the former aspect they are to be viewed not as general rules of law, but rather as edicts having only a particular application.

We must also conclude that the fiction that law is a complete existing entity which is merely interpreted by the courts, as well

as the related fiction that every act at the time of its commission is governed by existing law, is not an accurate or correct expression of the truth. The law as an abstract entity is in truth nothing more than the sum of all the sources of law actually in existence, together with the potential changes and additions which may occur from future legislative enactments and judicial decisions. Those sources of law are undeniably interpreted by the courts, but at the same time the courts also make new law in the manner above described. The law governing a particular case, on the other hand, consists of the sources of law which may be applicable to it as declared by the court which decides the case. While any one may have an opinion as to how the case should be decided, the legal rights and duties are not determined, and the law, therefore, is not known until the court has passed upon it. To say, then, that the law previously existed, and therefore is not made by the courts, is entirely unsound.

The errors which these fictions have introduced have had one important practical effect in that they have caused the Supreme Court of the United States, in the decisions to which we have before alluded, in effect to neglect the decisions of the state courts on the ground that they wrongly interpreted the law, in cases where, as a court of the United States, it was bound by the Judiciary Act of 1789¹ to respect the laws of those states. The tremendous mistake which the court has thereby made and its results are clearly pointed out by Mr. Justice Field in his dissenting opinion in *Baltimore & Ohio R. R. Co. v. Baugh*.² The ordinary practice, however, of courts which follow the common law is otherwise, since in cases where the law of a certain jurisdiction becomes material, the decisions of its courts are held to be conclusive as an authority or source of law.

Instead of being a complete existing entity we observe that law is ever in a process of growth. This growth is accomplished, aside from statutory changes, in two ways: first, by the extension and development of legal rights by analogy; and secondly, by the application of the principles of public policy, whether descended from the past or originally discovered or developed. In that part of the domain of law where the legal rights of parties in certain relationships or under certain circumstances are less fully determined, the decision of a particular case rests less upon rules of law and analogy with previous decisions, and more upon a consideration of the prin-

¹ C. 20, § 34. 1 Stat. at L. 92.

² 149 U. S. 368.

ciples of public policy. One there especially observes law in the process of growth, seeking to solve with justice a conflict between opposing interests. In other words, we see law in the making where judicial precedents cannot be found and the case is decided on general principles of public policy, becoming afterwards itself a striking precedent for similar cases.

It seems needless to attempt to call attention in detail to branches of the law which will support these observations. The growth of the law relating to rights of labor unions to interfere with the relationship between an employer and his employees is a most interesting example, showing the many new questions which have arisen as to what conduct on their part will be and what will not be held to be justifiable, and the new classes of legal rights and duties thereby created.

In each case where a decision is made, since every case must present some new aspect though differing in degree, there is some conflict which is solved by the decision, and some incongruity removed. By the decision and from the conflict a new resulting relative legal right is born, which right is applied to the facts as they existed, and at the same time adds to the sources of law.

Instead, then, of being a complete and unchangeable body or entity, law is something incomplete and imperfect, but containing a wonderful power for adaptability and growth. It is true that law in the abstract can be applied to every case, since every case must be decided. The conclusion is not, however, that law is already complete, but that law is made in order to decide the case. The system is complete because of the fact that judges can and do make law, and so the system can be applied to all possible new circumstances. Judges do not enact laws as a legislature does, nor do they act arbitrarily, but they do make laws indirectly in the course of giving their decisions, and since they must decide a case in one way or the other, they cannot avoid so doing.

Law is not an eternal truth, but a human and finite method of settling controversies and governing the relations of individuals, in which all differences are not errors, and which is adapted to suit the needs and express the ideals of the community over which it reigns.

Alexander Lincoln.

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LANGDELL HALL. — The new Law School building, Langdell Hall, of which we publish an illustration in this issue, will be ready for complete occupancy in the course of this month. In its present form it comprises only the center and the southern wing of the building as ultimately planned. It includes three lecture rooms, three reading-rooms, a faculty room, and the Dean's room, besides thirteen rooms for professors and rooms for the librarian and for his assistants. The shelf space, now only half its final size, has a capacity of 150,000 volumes. The first and third year classes will use Langdell Hall; the second year class will continue to use Austin Hall. The two buildings are connected by an underground passageway.

THE LAW SCHOOL. — The registration in the School on November 15 for the last twelve years is shown in the following table: —

	1896-7	1897-8	1898-9	1899-1900	1900-01	1901-02
Res. Grad. . . .	—	1	1	—	1	1
Third year . . .	93	130	102	134	144	149
Second year . . .	179	157	169	193	202	190
First year . . .	169	216	218	232	241	229
Specials	31	41	58	51	58	59
	472	545	548	610	646	628

	1902-03	1903-04	1904-05	1905-06	1906-07	1907-08
Res. Grad. . . .	—	4	1	1	—	2
Third year . . .	167	180	182	192	190	171
Second year . . .	196	201	232	216	199	198
First year . . .	228	293	285	243	243	280
Specials	49	60	58	64	62	63
	640	738	758	716	694	714

The following tables show the sources from which the twelve successive classes have been drawn, both as to previous college training and as to geographical districts :—

Class of	HARVARD GRADUATES.			Total.
	From Massachusetts.	New England outside of Massachusetts.	Outside of New England.	
1899	45	6	19	70
1900	50	11	30	91
1901	45	3	28	76
1902	59	2	28	89
1903	43	4	28	75
1904	47	5	17	69
1905	44	4	20	68
1906	52	7	32	91
1907	44	6	40	90
1908	39	5	27	71
1909	30	6	29	65
1910	46	9	38	93

Class of	GRADUATES OF OTHER COLLEGES.			Total.
	From Massachusetts.	New England outside of Massachusetts.	Outside of New England.	
1899	21	12	45	78
1900	30	19	60	109
1901	27	22	59	108
1902	22	29	61	112
1903	23	26	83	132
1904	25	29	74	128
1905	23	27	78	128
1906	30	45	92	167
1907	32	33	89	154
1908	19	33	96	148
1909	30	24	98	152
1910	25	27	101	153

Class of	HOLDING NO DEGREE.			Total.	Total of Class.
	From Massachusetts.	New England outside of Massachusetts.	Outside of New England.		
1899	11	2	8	21	169
1900	11	2	3	16	216
1901	25	—	9	34	218
1902	18	4	9	31	232
1903	21	1	12	34	241
1904	22	—	10	32	229
1905	12	2	18	32	228
1906	25	1	9	35	293
1907	18	5	18	41	285
1908	14	1	9	24	243
1909	11	3	12	26	243
1910	15	1	18	34	280

As the thirty-three Harvard seniors and the one Dartmouth senior in the first year class have in each instance completed the work required for the A. R. degree, all members of the class are virtually college graduates. The same is true of practically the entire School. Of the sixty-three special students, twenty-seven have entered this year, and of these twenty-two are graduates of a college or university, four having received a degree in law.

One hundred and twenty-one colleges and universities have representatives now in the School as compared with one hundred and twenty-two last year and one hundred and eighteen the previous year. In the first-year class sixty-eight colleges and universities, as compared with sixty-six last

year, are represented, as follows: Harvard, 93; Yale, 30; Brown, 11; Princeton, 9; Dartmouth, 8; Williams, 5; Amherst, Bowdoin, Columbia, Michigan, 4; California, Clark, Cornell University, State University of Iowa, Missouri, Rochester, Tufts, Washington & Jefferson, 3; Bates, Georgia, Hamilton, Leland Stanford, Jr., William Jewell, 2; Allegheny, Beloit, Carleton, Central, Chicago, Cornell College, Dakota Wesleyan, Dalhousie, De Pauw, Fargo, Fordham, Franklin, Georgetown College, Georgetown University, Gustavus Adolphus, Hamline, Holy Cross, University of Illinois, Iowa, Johns Hopkins, Kentucky State, Miami, Ohio Wesleyan, Oxford, Parsons, Pennsylvania, Pomona, St. Joseph's, St. Lawrence, St. Vincent's, Santa Clara, South, Syracuse, Trinity (Conn.), Trinity (N. C.), Union, Vermont, Virginia, Wake Forest, Washington, Wesleyan, Western Reserve, Western University of Pennsylvania, West Virginia, Wooster, 1. There are at present in the School eleven law school graduates, six of whom hold academic degrees also, representing the law schools of the following universities: Boston, Harvard, Illinois, Indiana, Iowa, Tennessee, George Washington, Western Reserve, Boston Y. M. C. A., West Virginia.

WHAT RULE OF DECISION SHOULD CONTROL IN INTERSTATE CONTROVERSIES. — In the Articles of Confederation provision was made for the appointment of commissioners to hear and determine controversies between the states, who were to decide the questions involved, not necessarily according to common law rules, but according to broad principles of right judgment.¹ And at the time of the adoption of the Constitution the narrowing effects of the establishment of the common law as a general rule of decision were contemplated.² Neither the Constitution itself, therefore, nor subsequent statutes establish the common law of England or of any state as the standard of decision for the Supreme Court in interstate controversies. But the absence of stipulated rules of decision and of forms of procedure does not appear to have embarrassed the court.³ In the case of boundary disputes between the states, the common law of the contending states may well serve as an adequate standard of rights.⁴ But in complicated questions affecting the so-called quasi-sovereign rights of the states, — in cases, for example, involving the pollution or diversion of interstate rivers, — the adequacy of common law rules seems questionable. The United States Supreme Court has accordingly developed the doctrine, supported by two recent cases, that the common law of private rights is not the measure of the rights of the states in interstate controversies.⁵ *Kansas v. Colorado*,⁶ 206 U. S. 46; *Georgia v. Tennessee Copper Co.*, 206 U. S. 230. Georgia was granted relief in equity against a Tennessee corporation which discharged noxious gases across the state line, on the principle that, though damages might be an adequate remedy for a private person, a state is not to be required to part with its quasi-sovereign rights for damages. This idea of state quasi-sovereignty also led the court to adopt in the Kansas case a position midway between the claim of Kansas, that the common law

¹ Art. IX.

² 2 Elliott, Debates, 346.

³ See *Rhode Island v. Mass.*, 12 Pet. (U. S.) 657; *Missouri v. Illinois*, 200 U. S. 496.

⁴ *Rhode Island v. Mass.*, *supra*. See 19 HARV. L. REV. 606.

⁵ See also *Missouri v. Illinois*, *supra*.

⁶ See also 21 HARV. L. REV. 47.

rule of riparian ownership should control, and the contention of Colorado, that international law should be the rule of decision.⁷ The court holds, on principles as broad as those suggested in the Articles of Confederation, that equality of right and a balance of benefits should be the rule of law in interstate controversies, and suggests that the body of law which the court is building up in this manner is "interstate common law."

It is necessary, however, to employ this phrase cautiously, for "interstate common law" had, of course, no prototype antedating the formation of the Union.⁸ But the conception of such a body of law is not fanciful, if simply taken to mean the principles established by the Supreme Court in its decisions of interstate disputes. In this sense it does not involve the much discussed question whether there is a common law of the United States as well as in the United States.⁹ For even though it is readily admitted that a separate federal common law of private rights does not exist, the Supreme Court is not forced to apply the common law of the states in the settlement of controversies between the states. That, indeed, would frequently be impossible, as when the rules of law of the conflicting states are opposed to each other. Moreover, it would deny the quasi-sovereign character of the states. This quasi-sovereignty, however, — the fact that a state as *parens patriae* has a higher status than a private person — is so well recognized by the Supreme Court that the mere fact that a state has no pecuniary interest in a controversy does not defeat the original jurisdiction of the court.¹⁰ The notion of a body of law applying peculiarly to interstate relations and this idea of quasi-sovereignty are interdependent. The latter justifies the former; the former is made necessary by the latter. The sanction for such law is to be found in the general language of Article III of the Constitution, which wisely provided for a flexible and progressive system of law by omitting to define the standards which should control the Supreme Court.

CLAIM OF UNCONSTITUTIONALITY BARRED BY ESTOPPEL. — The contention, not infrequently made, that a party can never be estopped from setting up unconstitutionality, is universally denied, but the treatment of the question in the cases is far from satisfactory. Our courts do not sit to revise the work of their co-ordinate department of government, the legislature. Their duty is to decide the controversy of the parties then before them. If the application of a certain statute to the case would result in a clear violation of the constitution, they will refuse to apply it. This, it would seem, is the rationale and extent of judicial power to declare legislation unconstitutional.¹ Moreover, as it is the duty of the legislature to act according to the constitution, the courts will naturally presume it has done so, and will apply the statute unless reason is shown why they should not.² The ques-

⁷ See 8 HARV. L. REV. 138.

⁸ Cf. *Penn. v. Lord Baltimore*, 1 Ves. 443.

⁹ See *Von Holst*, Const. Law, 161n; 36 Am. L. Rev. 498.

¹⁰ *Missouri v. Illinois*, 180 U. S. 208. See also *Kansas v. Colorado*, 185 U. S. 125, 142.

¹ *Marbury v. Madison*, 1 Cranch (U. S.) 137, 177, 178; *Von Holst*, Const. Law, 62; *Cooley*, Const. Lim., 7 ed., 228.

² See 7 HARV. L. REV. 120.

tion of estoppel is brought into some situations where, from the foregoing, it would seem unnecessary. It is controverted whether the state is estopped from setting up the unconstitutionality of a statute. The question is frequently only one of materiality. If the state is not affected thereby, the constitutionality of the statute is not at issue, since the court need not refuse to apply the statute to the case before it lest it violate the constitution, and therefore the state cannot go into the question.⁸ It is said, when a public officer is sued for money collected under a statute in his official capacity, he is estopped from denying its constitutionality to defeat the recovery. Again the question of constitutionality is immaterial. Granted the statute is unconstitutional, still as between him and the state, on principles of agency or trusts, the latter is entitled to money he avowedly collected for it.⁴ The question of constitutionality may thus be eliminated from other situations,⁵ but not from all. When a person has accepted benefits under a statute,⁶ or when he has merely begun suit under it, he is commonly said to be estopped from denying its constitutionality when it is attempted to impose upon him the liabilities created by it.⁷ Clearly this is not strict estoppel, for both parties are equally cognizant of the facts, and there is no misrepresentation of fact acted upon. Still the courts feel that the adoption of such inconsistent positions in these situations would be contrary to fairness and justice. Much the same feeling causes them to prevent a man dealing with a corporation as such from questioning the legality of its existence. For want of a better expression, apparently, they say the party is estopped. The truth is that the courts apply the statute to the case at bar because the party should not be permitted to show them why they should not.

In a recent Kentucky case this doctrine was extended to estop everybody from denying the constitutionality of an apportionment statute in effect thirteen years. *Adams v. Bosworth*, 102 S. W. 861. This would seem to be going too far. It is difficult to see how the party has adopted inconsistent attitudes producing an unfair situation. And the weight of authority has properly not extended the doctrine to estop one who has been merely passive, nor even one who has voted under a statute.⁸ Theoretically the mere efflux of time should be immaterial, as the court violates the constitution as much in applying this statute now as it would have thirteen years ago, and statutes have been declared unconstitutional after longer lapses of time.⁹ Then there is also the consideration that the whole community should not be kept from inquiring into a matter reaching, as this does, the very foundations of government.¹⁰ It amounts to constitutional amendment in a most informal way. The expressed fear of the court that the opposite holding would create enormous confusion through invalidating so much legislation, is unfounded, for, as another recent decision¹¹ pointed out, the legislatures elected under an unconstitutional apportionment are *de facto* ones, and as such their acts are entirely valid.

⁸ *People v. Brooklyn, etc.*, R. R., 89 N. Y. 75; *Atty.-Gen. v. Perkins*, 73 Mich. 303.

⁴ *People v. Bunker*, 70 Cal. 212; *Chandler v. State*, 1 Lea (Tenn.) 296.

⁵ *Cf. State v. Gardner*, 54 Oh. St. 24; *State v. Heard*, 47 La. Ann. 1679.

⁶ There are a few dicta to the effect that if he also requested the passage of the statute, he can be held in quasi-contract. See *Shepard v. Barron*, 194 U. S. 553.

⁷ *Daniels v. Tearney*, 102 U. S. 415; *Great Falls Co. v. Atty.-Gen.*, 124 U. S. 581.

⁸ *Counterman v. Dublin*, 38 Oh. St. 515; *Greencastle v. Black*, 5 Ind. 557.

⁹ *Philadelphia v. Ridge Ave. Ry.*, 142 Pa. St. 484.

¹⁰ *Denny v. State*, 144 Ind. 503.

¹¹ *Sherrill v. O'Brien*, 188 N. Y. 185, 212 *et seq.*

GRANTING CONCESSIONS FROM PUBLISHED INTERSTATE RAILROAD RATES. Section 10 of the Interstate Commerce Act as amended in 1889 made it a misdemeanor to obtain transportation at less than the regular rate by means of false billing, and provided that violations of this section should be prosecuted in any federal court having jurisdiction of crimes in the district in which the offense was committed.¹ The federal statutes provide that when any offense against the United States is begun in one circuit and completed in another the courts of either circuit shall have jurisdiction over the whole offense.² Under these enactments it has been held that the offense of obtaining transportation at less than the regular rate by means of false billing is complete in the district in which the goods were delivered to the carrier, that actual carriage is not an essential element of the offense, and that courts in the district to which the goods were transported have no jurisdiction.³ The Elkins Act of 1903, amending the Interstate Commerce Act, provided that the offense of giving or accepting concessions from the published rate should be prosecuted in any court of the United States having jurisdiction of crimes in the district in which the offense was committed or "through which the transportation is conducted."⁴ The Act also embodies the section of the federal statutes in regard to offenses begun in one jurisdiction and completed in another. These amendments made by the Elkins Act are substantially unaltered by the legislation of 1906. It remains for the courts, therefore, to determine the exact effects of the changes made by the Elkins Act.

Though jurisdiction is given to courts in the districts through which transportation is conducted, it is not probable that actual carriage has been made an essential element of the offense of obtaining the forbidden concessions. It is true that giving a "free pass" is not a violation of the section of the Interstate Commerce Act forbidding the granting of preferences unless actual transportation is secured.⁵ But the concessions under consideration are like the concessions obtained by false billing, and if the goods are delivered to the carrier, and the concession secured, even if the goods are lost before actual carriage, there is little doubt an indictment would be sustained. Consequently there is ground for holding that the provision under consideration is unconstitutional in that it provides for the prosecution of an offense in districts other than that in which it was committed.⁶ However, in a recent federal case where the goods were delivered and the concession received in one district, and the prosecution instituted in a different district, but one through which the transportation had been conducted, it was held that the court had jurisdiction. *Armour Packing Co. v. United States*, 153 Fed. 1 (C. C. A., Eighth Circ.). In the decision, while it is tacitly admitted that the offense is complete when the concession is obtained and the goods delivered to the carrier, the clause giving jurisdiction to courts in the districts through which the transportation is conducted is held constitutional by resorting to the analogy of the fiction of continuing trespass made use of

¹ 25 Stat. at L. 858.

² 14 Stat. at L. 484.

³ *Davis v. United States*, 104 Fed. 136.

⁴ 32 Stat. at L. 847. By this act it is made unlawful "to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce."

⁵ *In re Huntington*, 68 Fed. 881.

⁶ See Amend. VI.

in some cases of larceny.⁷ Obtaining concessions whereby transportation at less than the published rate is secured is considered a continuing act. If the illegal act is complete when the concession is secured and the goods delivered to the carrier, it is difficult to see how part of the same illegal act is committed every time the goods pass into a new district.

EXCLUSIVE FEDERAL CONTROL OVER NATIONAL BANKS. — It was early settled that Congress had the power to create national banks, as instruments "necessary and proper" for carrying on the fiscal operations of government.¹ And to enable these banks to exercise their national functions of providing a currency and of creating a market for government loans, the grant of ordinary banking powers is justified.² Furthermore, to assure the efficiency of these federal agencies, it is necessary that both in the exercise of their national functions and in their ordinary banking business they should be protected from any state interference which might impair or destroy their usefulness. It is accordingly settled that a state cannot tax a national bank, unless the federal government give special permission.³ It seems obvious that any interference with the purely national functions of the bank is unconstitutional. The ordinary business, on the other hand, is done under the general state laws unless some special act of Congress covers the matter.⁴ Thus, a national bank ordinarily takes title to property subject to the qualifications imposed by the state law.⁵ Similarly, a state law, which exempts from trustee process negotiable paper transferred before due to a bank within the state, is valid although it works to the discrimination and disadvantage of a national bank without the state.⁶ In this class of cases the state law interferes with the bank, but as it touches only the general business and does not conflict with any express law, it is upheld. But Congress, having the right to grant general banking powers, can regulate the exercise of those powers and protect the banks in that business. Unless the law be unconstitutional because not a reasonable exercise of the power to regulate or protect, or because contrary to some constitutional provision such as the Fourteenth Amendment, it will supersede the state law which formerly controlled. The national laws may supersede all state laws on the subject, or they may be merely supplemental and overrule only the laws in direct conflict. An example of the latter class is the case where the federal law mentions certain crimes of bank officers. For these crimes the officers can only be punished by the national government, but that does not prevent the state from punishing for other crimes committed by bank officers contrary to state laws.⁷ But if, on the other hand, the national government undertakes to make a system of rules and regulations covering an entire subject, such as the insolvency of a national bank, all state laws on the subject, even if not in direct conflict with the federal law, are annulled.⁸ Sim-

⁷ See 12 HARV. L. REV. 425.

¹ *McCulloch v. Maryland*, 4 Wheat. (U. S.) 316.

² *Osborn v. Bank*, 9 Wheat. (U. S.) 738.

³ *McCulloch v. Maryland*, *supra*; *People v. Bank*, 123 Cal. 53.

⁴ *McClellan v. Chipman*, 164 U. S. 347.

⁵ *Bank v. Augusta, etc., Co.*, 104 Ga. 403.

⁶ *Hawley v. Hurd, etc., Co.*, 72 Vt. 122.

⁷ *State v. Tuller*, 34 Conn. 280.

⁸ *Easton v. Iowa*, 188 U. S. 220. See 17 HARV. L. REV. 133.

ilarly, the National Banking Act, which provides what interest the banks can charge and the results and penalties of taking usury, has been construed as sweeping away all state usury laws as far as they affect national banks.⁹

A recent New York case shows the far-reaching effect of this doctrine. The proposition is upheld that a note between A and B, which by state law is absolutely void for usury, is enforceable when discounted by a national bank. *Schlesinger v. Gilhooly*, 189 N. Y. 1.¹⁰ Thus, through the power to say that a defense given by the state shall not be good against a national bank, the whole law of the state as to usury is rendered ineffective, for a note otherwise void can be made enforceable, as to the principal at least, by a sale to a national bank. The result is astounding, but seems a logical consequence of the power of Congress to pass exclusive laws as to the business dealings of national banks.

RECOVERY UNDER EXECUTORY ILLEGAL CONTRACTS. — It is a general rule of law that no cause of action arises out of an illegal contract whether recovery be sought on the contract for a breach of it or in quasi-contract. It is the settled policy of the law not to allow a legal right to be based upon an illegal transaction. Under no circumstances, it seems, can there be a recovery if the contract contemplates the performance of an act which is *malum in se*;¹ for in such cases the formation, as well as the performance of the contract, is an injury to the state. Thus, where there is an agreement to share the proceeds of a common crime, one criminal cannot recover from the other who takes the whole.² Again, if the illegal act, though only *malum prohibitum*, has been completed in whole or in part, the law will not interfere if the parties are equally at fault,³ for the harm to the state can no longer be prevented. Thus, where a bankrupt paid a creditor a sum of money not to appear at his examination, nor to oppose his discharge, the bankrupt was not allowed to recover after the defendant had failed to appear at the examination, though no application for the discharge had been filed.⁴

But where the purpose of the contract is not *malum in se*, and is not accomplished, a recovery has been allowed in two sorts of cases. The first class is where neither party agrees to do an act illegal in itself, apart from the contract, but where the performance becomes illegal because done in pursuance of the contract. This includes the so-called "stakeholder cases," in which the loser is allowed to recover from the winner, if the stakeholder pays over the stakes after the loser has revoked his authority.⁵ The policy of allowing a recovery in these cases is clear; either party is given a chance to avoid the contract and prevent its performance. The second class includes those cases in which, having paid the defendant to commit an illegal act, the plaintiff is allowed to disaffirm the contract at any time before the defendant has performed, and to recover that which he has advanced. Thus,

⁹ *Farmers', etc., Bank v. Dearing*, 91 U. S. 29.

¹⁰ See 20 HARV. L. REV. 581.

¹ See *Spring Co. v. Knowlton*, 103 U. S. 49.

² *The Highwayman's Case*, Scott, Cas. on Quasi-Contracts, 666. See *Tappenden v. Randall*, 2 B. & P. 467.

³ If the parties are not *in pari delicto*, he who is less at fault may recover whether or not the contract is executed. *White v. Franklin Bank*, 22 Pick. (Mass.) 181. See 20 HARV. L. REV. 60.

⁴ *Kearley v. Thomson*, 24 Q. B. D. 742.

⁵ *Love v. Harvey*, 114 Mass. 80.

where a woman paid the defendant to procure a husband for her, she was allowed to recover the money so paid, since the defendant had not performed.⁶ This, too, seems to be in accordance with the policy of the law to prevent, not the formation, but the performance of such contracts. Is a recovery allowable in a possible third class of illegal contracts, *vis.*, those in which the plaintiff agrees to do the illegal act, and, disaffirming after he has partially performed, seeks to recover for the partial performance? It was held in a recent Massachusetts case that he can recover so long as the part performance itself was not illegal. *Eastern Expanded Metal Co. v. Webbs Granite and Construction Co.*, 81 N. E. 251. This seems correct, for as far as the illegal act is concerned the contract was still executory; and a recovery before the harm was done would tend to prevent the doing of it. Therefore the rule may now, perhaps, be broadly stated, covering all these classes of cases, that a recovery is allowed in quasi-contract for benefits furnished under a contract illegal but not *malum in se*, so long as no part of the illegal purpose has been consummated.

THE EXERCISE OF NON-JUDICIAL FUNCTIONS BY THE JUDICIARY. — In the European states the theory of separation of powers has been accepted as a decree that the legislative and executive branches, in the administration of public affairs, shall be free from interference by the judiciary.¹ In America, however, the separation of powers has not been taken as a limitation upon the judiciary, but rather as an elevation of it to the position of an independent department of government as supreme in its particular field as either of its co-ordinate departments in theirs.² If this theory of governmental organization is to be successfully executed, it is imperative that each department exercise vigilance to see that none of the functions delegated to it by the constitution are exercised by co-ordinate departments;³ equally, it must be careful not to infringe the prerogatives of the other branches.⁴ Moreover, a proper respect for its dignity as an independent, co-ordinate branch of government must compel it to decline to perform duties where its final action is to be subjected to review by another department.⁵ It would seem that, with the prerogatives of each department thus guarded, the whole purpose of the separation of powers is achieved. Subject to these limitations each department should be free to perform any duties assigned to it. The practical difficulties in the operation of this scheme of government arise from the fact that all the functions of government are not capable of being readily subjected to classification as executive, legislative, or judicial. Indeed it is asserted that some of the functions of government may equally well be assigned to any one of the departments.⁶ However, the tendency of the courts has been to insist that none but judicial functions may be exercised by the

⁶ *Hermann v. Charlesworth*, [1905] 2 K. B. 123. See 12 HARV. L. REV. 436.

¹ Lowell, *Governments and Parties in Continental Europe*, 55.

² See *The Federalist*, Number 51.

³ See *Taylor v. Place*, 4 R. I. 324.

⁴ *Norwalk Street Ry. Co.'s Appeal*, 69 Conn. 576; *Shepherd v. Wheeling*, 30 W. Va. 479; *Auditor v. Atchison, etc.*, R. R. Co., 6 Kan. 500.

⁵ Note to *Hayburn's Case*, 2 Dall. (U. S.) 410. See *United States v. Ferreira*, 13 How. (U. S.) 40.

⁶ *Paul v. Gloucester County*, 50 N. J. L. 585. Cf. *State v. Brill*, 111 N. W. 639 (Minn.); *Salem, etc., Corporation v. County of Essex*, 100 Mass. 282.

judiciary.⁷ Although this assertion may rest in part on a theory that the constitution has granted to the judiciary only judicial powers,⁸ it seems generally due to the repetition of a dictum by federal judges on their refusal to render a judgment which would be subject to revision by the executive department.⁹ If it is proper for the judiciary to decline to perform any but judicial functions, it must also be proper for the executive to decline to perform aught but executive functions, and for the legislature to refuse to do anything not in its essence legislative. And consequently, if it is true that some functions of government do not properly fall within any particular department, either the constitutional machinery is hopelessly inadequate or this theory of limitation of departmental activity must fall.

It is inconceivable that the introduction into our constitutions of the theory of the separation of powers makes it possible that any function of government must remain unexercised because of difficulty in ascertaining to which department it properly belongs. Certainly the judiciary cannot, with propriety, decline to perform a duty attempted to be imposed upon it, unless the department to which that duty belongs is definitely ascertained to be one other than the judicial.¹⁰ The Appellate Division of the Supreme Court of New York has recently sustained the constitutionality of a statute which imposed on the courts the duty of rendering decisions on disputed election ballots, counting all the ballots cast, and issuing an order which should supersede the regular election returns. *Metz v. Maddox*, 105 N. Y. Supp. 702. Although this statute imposes duties which differ in many respects from those ordinarily performed by courts, it does not seem possible to attribute those duties with certainty to either the executive or the legislative departments. It is therefore conceived that the true theory of the separation of powers supports the assumption of this burden by the judiciary.¹¹

NATURE OF THE INTEREST CREATED BY AGREEMENTS RESTRICTING THE USE OF REALTY. — It is admittedly law that an agreement restricting the use of land is enforceable in equity. But the true nature of the right acquired is as yet unsettled. It has been likened to a combination of a specifically enforceable contract and a constructive trust,¹ and compared with a warranty of title² and with a negative easement. It has many points of resemblance to this last, though not rising to the dignity of a true legal easement. In neither case has the owner of the dominant estate any right to do an act on the servient; and in both the right should properly arise by covenant and not by grant.³ It has been argued that a right of property is destroyed by a restrictive agreement and belongs to no one; but this is no more true than in the case of a negative easement. If there is an agreement not to build,

⁷ In the Matter of the Application of the Senate, 10 Minn. 78.

⁸ The Constitution of the State of New York does not expressly confide the judicial power to the courts.

⁹ Note to Hayburn's Case, *supra*.

¹⁰ State v. Bates, 96 Minn. 110.

¹¹ Cf. Citizens Bank v. Town of Greenough, 173 N. Y. 215; Forsythe v. City of Hammond, 68 Fed. 774; Robinson v. Kerrigan, 90 Pac. 129 (Cal.); Somerset v. Hunterdon, 52 N. J. L. 512.

¹ See 5 HARV. L. REV. 274.

² See 17 HARV. L. REV. 174.

³ See Fry, J. in Dalton v. Angus, 6 App. Cas. 740, 771.

neither the promisor nor the promisee can build on the promisor's land; if there is an easement for lateral support, neither the owner of the servient nor the owner of the dominant tenement can excavate on the servient. But the right is not destroyed; it is merely divided, since either can act with the other's consent. The benefit of such a covenant passes to the purchaser of the covenantee's land whether he knew of the covenant or not,⁴ and the covenantor is free from all liability as soon as he conveys away his land.⁵ The land is bound in the hands of subsequent grantees, under-lessees,⁶ or mere occupiers,⁷ with notice; or even, it is believed, in the hands of one who has acquired the title by adverse possession.⁸ Moreover, such agreements have been held to create interests in land within the statute of frauds.⁹ The fineness of the distinction between these rights and negative easements is further indicated by the fact that a covenant not to obstruct lights will create a legal easement,¹⁰ while a covenant not to build beyond a certain line will not.

The question whether the right created by a restrictive agreement is a property right, was presented in a recent case of eminent domain proceedings, in which the court refused to allow the owner of such a right compensation, on the ground that he had no common law easement. *Wharton v. United States*, 153 Fed. 876 (C. C. A., First Circ.). Even if these rights are not true common law easements, practically the only distinction, as we have seen, is that they are enforceable only in equity, and consequently can be extinguished by a sale to a *bona fide* purchaser. Therefore, at the present time, when the differences between law and equity have been so greatly diminished, and when the registry acts give constructive notice, there seems to be no valid reason why such rights should not be held property rights, equitable rights only, to be sure, but still property. At all events, when land subject to restrictive agreements is taken by eminent domain, in justice, and on analogy to cases of inchoate dower,¹¹ it seems clear that the government should pay the owner of the quasi-servient estate its value when discharged of the easement, and that he, in turn, should account to the owner of the quasi-dominant for a just share of the compensation received. For the same reasons it follows that if the owner sells the land to a *bona fide* purchaser he should account for a share of the proceeds, since he has received the full value of the land unencumbered, and has destroyed at least an equitable property right.

RECENT CASES.

ATTORNEYS — DUTIES ATTACHED TO THE OFFICE — ORDER TO PAY UNENFORCEABLE OBLIGATION. — A solicitor wrote to his client's former solicitors that the client had placed in his hands the full amount of their bill, so that he

⁴ See *Rogers v. Hosegood*, [1900] 2 Ch. 388, 406.

⁵ *Hall v. Ewin*, 37 Ch. D. 74.

⁶ *Johns Bros. v. Holmes*, [1900] 1 Ch. 188.

⁷ *Mander v. Falke*, [1891] 2 Ch. 554.

⁸ *Re Nisbet and Potts Contract*, [1906] 1 Ch. 386.

⁹ *Wolfe v. Frost*, 4 Sandf. Ch. (N. Y.) 72; *Rice v. Roberts*, 24 Wis. 461. The cases seemingly opposed are based on principles of fraud or estoppel. See *Lennig v. Ocean City Ass'n*, 41 N. J. Eq. 606, 609.

¹⁰ *Ladd v. Boston*, 151 Mass. 585.

¹¹ *Moore v. City of New York*, 8 N. Y. 110; *Wheeler v. Kirtland*, 27 N. J. Eq. 534.

would be in a position to pay them. Relying on this statement, they forbore proceedings to enforce payment. *Held*, that the solicitor has no defense to summary process for payment of the bill. *In re A Solicitor*, [1907] 2 K. B. 539.

The court took the position that whether or not the transaction created any legal or equitable right is immaterial; since the solicitor gave his word to pay, the court will compel him to do so. It is general law in this country that the remedy by summary proceeding lies only on the application of a client against his attorney. *Hess v. Joseph*, 7 Rob. (N. Y.) 609. It is also held that the latter may plead whatever defense he would have to an action. *Jones v. Miller*, 1 Swan (Tenn.) 151. A different view, however, prevails in England. The applicant need not be the solicitor's client. *In re Gee*, 2 D. & L. 997. Nor can the solicitor plead certain technical defenses, such as the statutes of frauds or of limitations. *In re Hilliard*, 2 D. & L. 919; *Ex parte Sharpe*, 5 Dowl. P. C. 717. This view is based on the theory that the process is to secure honorable conduct on the part of officers of the court when acting in that capacity, and that the legal validity of the undertaking is solely a secondary consideration. *Ex parte Bentley*, 2 Deac. & C. 578. The English doctrine seems better on principle, since the proceeding is primarily for the punishment of the attorney rather than for the relief of the client.

BANKRUPTCY — PREFERENCES — RETURN OF MISAPPROPRIATED FUNDS THROUGH MISAPPROPRIATING AGENT. — The president of a bankrupt corporation, just before failure, repaid to himself as agent of the defendant company money which he had secretly misappropriated for the use of the bankrupt corporation. Under § 60 of the Bankruptcy Act of 1898, if a preference is given and "the person receiving it . . . or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference," the trustee may recover the property. *Held*, that the trustee in bankruptcy cannot recover. *McNaboe v. Columbian Manufacturing Company*, 153 Fed. 967 (C. C. A., Second Circ.).

The general rule is that the knowledge of the agent is the constructive knowledge of the principal. *Wright v. Cotten*, 140 N. C. 1. But if the agent acts fraudulently toward his principal for his own benefit, the doctrine of constructive knowledge does not apply. *In re Marseilles, etc., Co.*, L. R. 7 Ch. 161; *De Kay v. Hackensack Water Co.*, 38 N. J. Eq. 158. Many courts say that in such cases there is a presumption that the agent will not communicate with the principal; but the true ground is that the agent is acting beyond the scope of his authority. *Allen v. South Boston Ry. Co.*, 150 Mass. 200; *contra, Frenkel v. Hudson*, 82 Ala. 158. In the present case, therefore, if the agent was acting beyond the scope of his authority he ceased to represent the defendant in the transaction, and the words in the Bankruptcy Act, "or by his agent acting therein," cannot as a matter of law make the defendant liable for his knowledge acquired in such transaction. It might be arguable that while the defaulter was not the defendant's agent to misappropriate the funds, he was its agent to collect the resulting debt of the bankrupt company, but the court seems correct in treating it as virtually one secret fraudulent transaction. *Lindsey v. Lambert Building Ass'n*, 4 Fed. 48.

BANKRUPTCY — PREFERENCES — RETURN OF PAYMENT TO DEBTOR PAYING IN IGNORANCE OF SET-OFF. — Bank A, shortly before bankruptcy, fraudulently appropriated the proceeds of a note it collected for bank B. Bank B, not knowing of the appropriation, collected a draft, as agent for A, and forwarded the proceeds, which were received by the assignee in bankruptcy. It appeared that the day before going into bankruptcy the partners composing bank A had declared that B "owes us as much as we do them. That is a stand-off." *Held*, that B may recover back enough of the fund forwarded to satisfy its claim. *In re Northrup*, 152 Fed. 763 (Dist. Ct., N. D. N. Y.).

If the conversation between the partners is interpreted as setting aside A's claim against B in trust for B, it would seem to create a preference. It is true that B, if sued, could set off its claim against A, under § 68 of the Bankruptcy Act of 1898 providing for the set-off of mutual debts and mutual credits. See

Goodrich v. Dobson, 43 Conn. 576. A's claim is, nevertheless, absolute, and must be paid by cash or set-off; hence it is a part of his assets to which the general creditors are entitled. It cannot be said that a claim to which there is no defense is of no value merely because the debtor may invoke his right to set-off. On the other hand it may be urged that A, by receiving the money, fraudulently permitted B to destroy his set-off and therefore held it in trust, as when a bankrupt receives goods knowing of his insolvency. In the latter case, however, the bankruptcy would be a good ground for refusal to deliver, while in the present case, again applying the same reasoning, A had an absolute right to receive payment, either by cash or set-off, which should be devoted to the interests of the general creditors.

BANKRUPTCY — PRIORITY OF CLAIMS — INFANT'S CLAIM AFTER AVOIDANCE OF CONTRACT. — An infant obtained a bill of sale from a bankrupt to secure advances previously made, and after his claim of preference by virtue of such bill of sale had been disallowed, he elected to avoid his contract and claimed the whole amount advanced, on the ground of his infancy. *Held*, that he is entitled only to claim as a general creditor. *In re Hunttenberg*, 153 Fed. 768 (Dist. Ct., E. D. N. Y.).

A creditor who has received a preference and has been compelled by judgment to surrender it, may nevertheless prove his claim against the estate. *Keppel v. Tiffin Savings Bank*, 197 U. S. 356; see 19 HARV. L. REV. 59. And the avoidance of his contract by an infant who has advanced money is effective only to constitute him a creditor for the amount, which he may immediately recover in assumpsit. See *Robinson v. Weeks*, 56 Me. 102. His claim, in such an event, does not appear superior to that of the ordinary creditor. Consequently, as infancy is not a ground for priority in payment from the estate under § 64 of the Bankruptcy Act, which provides for priorities, the result reached in the present case seems eminently sound.

BANKRUPTCY — PROVABLE CLAIMS — PROOF AFTER TERMINATION OF COLLATERAL LITIGATION. — An attachment suit pending at the time of bankruptcy against the bankrupt at the suit of a creditor did not terminate within a year and thirty days after the adjudication. *Held*, that the creditor is entitled to prove his claim after the termination of the suit. *In re Baird*, 154 Fed. 215 (Dist. Ct., E. D. Pa.).

§ 57 *n* of the Bankruptcy Act of 1898 provides that "claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication; or if they are liquidated by litigation and the final judgment therein is rendered within thirty days before or after the expiration of such time, then within sixty days after the rendition of such judgment." The court in the present case expressly defers to the authority of a recent case which interpreted this exception clause to mean, "if . . . the final judgment therein is rendered within thirty days before the expiration of such time, or at any time thereafter." *Powell v. Leavitt*, 150 Fed. 89. This departure from the explicit and unambiguous terms of an exception clause, evidently intended to be prohibitory and to ensure a speedy settlement of the estate, is in violation of the first principles of statutory construction requiring strict interpretation of such clauses. See *U. S. v. Dickson*, 15 Pet. (U. S.) 141, 165. If provision is needed for such a contingency as the case presents, it is a matter for legislative discretion, not for extraordinary judicial license.

CARRIERS — CONNECTING LINES — THROUGH RATES. — Goods were shipped on a through bill of lading over connecting railroads which did not give joint through rates. While the goods were in transit over the first railroad, the second lowered its rates. *Held*, that the shipper must pay the combined rate existing at the time he shipped and cannot take advantage of the reduction. *In the Matter of Through Routes and Through Rates*, 12 Interst. C. Rep. 190.

When two railroads have agreed to establish through routes between points in separate states, the charge they make is to be regarded as a unit. See *Brady v. Penn. Ry. Co.*, 2 Interst. C. Rep. 78. Recognition of a through bill of

lading by connecting carriers puts them in the same position as if they had expressly agreed to establish through routes. *Cincinnati, etc., Ry. Co. v. Interstate Com. Com.*, 162 U. S. 184; see *Louisville, etc., Ry. Co. v. Behlmer*, 175 U. S. 648, 662. This ruling of the Interstate Commerce Commissioners applies to the class of routes thus created the rule that the sum of the charges of each carrier must be a unit corresponding to a single established joint rate. Their holding, that the rate as fixed at the time of shipment is unalterable by the second carrier, will tend to relieve the shipper from unexpected increase in freight charges, and furthermore, to remove an uncertainty that lately has much troubled shippers and carriers when similar changes in rates have been made.

CARRIERS — DUTY TO TRANSPORT AND DELIVER — REMOVAL OF SPUR TRACK WITHOUT NOTICE. — The defendant, as part of its public business, operated a spur track, over which it had carried wood for the plaintiff. This operation was not required by statute or charter. The plaintiff had wood ready for transportation, some of which was already in the custody of the defendant when the latter removed the track without notice. *Held*, that the plaintiff can recover for the damage caused by the failure to give reasonable notice of the removal. *Durden v. Southern Ry. Co.*, 58 S. E. 209 (Ga., Ct. App.).

The defendant's duties were only those imposed by the common law, and its right to remove the track seems well established. *Jones v. Newport News, etc., Co.*, 65 Fed. 736. But a common carrier is bound to carry according to its profession. *Pickford v. Grand Junction Ry.*, 8 M. & W. 372. It is liable for damages caused by the publication of a time-table it knows to be inaccurate. *Denton v. G. N. Ry.*, 5 E. & B. 860. And the same principle that applies to representations published in a time-table seems applicable to representations of a carrier made public by its acts. Consequently, if the defendant, while it maintained the track, had refused without notice or valid reason to carry wood for the plaintiff, it would have been liable for the resulting damage. *Streeter v. Horlock*, 7 Moore C. P. 283. Usually the carrier is not liable unless the goods have been tendered. *Little Rock, etc., Ry. v. Conaster*, 61 Ark. 560. But this does not apply where part of the goods have been tendered. *Houston, etc., Ry. v. Campbell*, 91 Tex. 551. Therefore, in the present case, by failing to give notice before removing the siding, the railroad refused to carry a tendered shipment according to its profession and should be liable for the resulting damage.

CONFLICT OF LAWS — OBLIGATIONS EX DELICTO — WHETHER LAW OF PLACE OF DEATH OR OF INJURY GOVERNS ACTION FOR DEATH. — The Pennsylvania statute gave the widow a right of action for death by wrongful act. The New Jersey statute vested such a right in the personal representative. A widow whose husband had died in Pennsylvania from injuries received in New Jersey, through the negligence of the defendant, brought suit. *Held*, that she may recover under the Pennsylvania statute. *Hoedmacher v. Lehigh Valley Ry. Co.*, 66 Atl. 975 (Pa.).

The fatal impact is somewhat arbitrarily selected as the element in murder giving criminal jurisdiction, regardless of the place of death. *State v. Gessert*, 21 Minn. 369. Likewise, where death results from negligent injury, it has been assumed that the cause of action arises where the injury, and not where the death, takes place. *Slater v. Mexican Nat'l Ry. Co.*, 194 U. S. 120, 127. If the statutes of the place of injury give no action, recovery is refused even if a remedial statute exists at the place of death. *De Harn v. Mexican Nat'l Ry. Co.*, 86 Tex. 68; *Rudiger v. Chicago, etc., Ry. Co.*, 94 Wis. 191. It is true that such statutes create a new right of action, to the accrual of which death is a condition precedent. See 15 HARV. L. REV. 854. The decisions cited, however, lead to the conclusion that while the prosecution for murder or civil action for death cannot be maintained until death occurs, the real cause of action is the infliction of the injury. The results of the injury merely determine the character of the action. But the law of the place where the cause of action accrues should govern, hence the present decision seems unsound.

CONFLICT OF LAWS — TESTAMENTARY SUCCESSION — ADMINISTRATION OF TRUSTS OF PERSONALTY CREATED BY WILL. — An Illinois testator be-

queathed a fund in trust for a married woman with a provision that during the lifetime of her husband she should receive only the interest. The trustee, the *cestui*, and the property were in Texas. By the law of Texas such restraint is enforceable; by the law of Illinois it is not. While her husband was still alive the *cestui* sued to get the corpus of the trust fund. *Held*, that the *cestui* cannot recover, since the administration of the trust is governed by the law of Texas. *Lanius v. Fletcher*, 101 S. W. 1076 (Tex., Sup. Ct.).

Questions of the administration of testamentary trusts of personalty are properly governed by the law of the place of administration. *Parkhurst v. Roy*, 7 Ont. App. 614; see 20 HARV. L. REV. 382, 393. The decision in the present case, however, was based, not on this sound ground, but on the theory that the law of Texas governed because it was the evident intention of the testator that it should govern. This is clearly a misconception. It is true that the testator's intention as to what law should govern may be of importance. Thus, in interpreting the meaning of a bequest, if the testator had in mind the law of another state, it will be construed by that law. *Harrison v. Nixon*, 9 Pet. (U. S.) 483, 504. Again, in cases where the place of administration is doubtful, the intention is important because it helps to determine that place, which would ordinarily be the domicile of the testator. *Cross v. U. S. Trust Co.*, 131 N. Y. 330; *Rosenbaum v. Garrett*, 57 N. J. Eq. 186. But to say that a trust, created and administered in the same state, could by the mere desire of the testator be governed by the laws of some foreign state, is to reduce the proposition relied on by the court to an absurdity.

CONSPIRACY — CRIMINAL LIABILITY — DAMAGE TO PERSON IN HIS TRADE OR CALLING. — In accordance with an agreement of theatre managers to exclude the complainant, a dramatic critic, from their play-houses, he was refused admission to certain performances. The sole motive of the theatre managers was to protect themselves from public articles reflecting on their personal integrity and on their religious faith. *Held*, that the agreement is not criminal under the Penal Code of New York. *People v. Flynn*, 189 N. Y. 180.

For a discussion of this case in the lower court, see 20 HARV. L. REV. 68.

CONSTITUTIONAL LAW — NATURE AND DEVELOPMENT OF CONSTITUTIONAL GOVERNMENT — STATE QUASI-SOVEREIGNTY. — The State of Georgia as quasi-sovereign sought to enjoin a Tennessee corporation from discharging noxious gases across the state line. It did not appear that an action at law would be an inadequate remedy, if it were an issue between private parties. *Held*, that if the defendant failed to abate the nuisance, an injunction should be granted. *Georgia v. Tennessee Copper Co.*, 206 U. S. 230. See NOTES, p. 132.

CONSTITUTIONAL LAW — POWERS OF CONGRESS — EXCLUSIVE FEDERAL CONTROL OVER NATIONAL BANKS. — § 5198 of the U. S. Compiled Statutes 1901 provides that, though a national bank knowingly charges a usurious rate of interest, the instrument shall not be void. N. Y. Laws 1837, c. 430, § 1, provides that all instruments charging a usurious rate shall be void; but N. Y. Laws 1892, c. 689, § 55, makes state banks subject to the same usury laws as national banks. A note was made by the defendant at a usurious rate to a payee not a bank. It was later bought at a legal rate by the plaintiff, a state bank. *Held*, that since Congress exercised its power of passing exclusive laws governing the effect of usury on national banks, as to such banks, and consequently as to state banks, the general usury law is superseded, and hence the note is enforceable. *Schlesinger v. Gilhooly*, 189 N. Y. 1. See NOTES, p. 136.

CONSTITUTIONAL LAW — POWERS OF THE JUDICIARY — INTERSTATE COMMON LAW. — Kansas filed a bill in the United States Supreme Court to restrain Colorado from using the waters of the Arkansas River for irrigation purposes. On the question as to what rule of decision should apply, Kansas contended that the common law rule of riparian ownership should control; Colorado, that on principles of international law controversies between states

should be justiciable only if justifying reprisal between independent nations. *Held*, that broad principles of state equality should control, and that the body of decisions on interstate controversies constitute interstate common law. *Kansas v. Colorado*, 206 U. S. 46. See NOTES, p. 132.

CONSTITUTIONAL LAW — SEPARATION OF POWERS — JUDICIAL RECOUNT AND RE-CANVASS OF BALLOTS. — A statute provided that upon petition by any candidate for a certain office the Supreme Court must summarily canvass the ballots cast. *Held*, that the statute imposes judicial duties on the courts and is therefore valid. *Mets v. Maddox*, 105 N. Y. Supp. 702 (App. Div.). See NOTES, p. 138.

CONSTITUTIONAL LAW — WHO CAN SET UP UNCONSTITUTIONALITY — ESTOPPEL THROUGH LAPSE OF TIME. — The plaintiff sought to assail an act of the legislature, passed thirteen years before, dividing the state into senatorial districts. *Held*, that it is too late to question the validity of the act. *Adams v. Bosworth*, 102 S. W. 861 (Ky.). See NOTES, p. 133.

CRIMINAL LAW — SENTENCE — FEDERAL COURTS' RIGHT TO IMPRISON TO ENFORCE FINE. — The defendant was convicted under a federal statute ordering punishment by a fine, but providing no penalty of imprisonment. *Held*, that the court has common law jurisdiction to decree that the defendant shall stand committed to jail until the fine be paid, or he be otherwise discharged according to law. *Ex parte Barclay*, 153 Fed. 669 (Circ. Ct., Dist. Me.).

A sentence which does not conform to the punishment provided by statute is void. *In re Pridgeon*, 57 Fed. 200. But at common law, a sentence of fine may provide that the defendant stand committed till his fine be paid. *Harris v. Commonwealth*, 23 Pick. (Mass.) 280. The theory allowing such imprisonment is that the fine alone is the penalty, whereas the imprisonment enforces its collection. *Ex parte Bryant*, 24 Fla. 278. The commitment being on this basis, the sentence in the principal case would not be void in a common-law court as exceeding the statute. But whether federal courts have common-law powers in this respect admits of doubt. The courts of the United States, as a general rule, have no common-law jurisdiction in criminal cases. *U. S. v. Lewis*, 36 Fed. 449. But they are authorized to adopt common-law procedure when the jurisdiction and powers given by United States laws do not provide adequate remedies. U. S. COMP. STAT. 1901, § 722. Such inadequacy did not exist in the principal case, since federal statutes provide for the collection of fines by execution against the defendant's property, as in civil cases. U. S. COMP. STAT. 1901, § 1041. The decree of imprisonment seems therefore unjustified as an exercise of common-law powers. A previous decision, however, supports such a sentence, although the court gave no reasons for its conclusion. *Ex parte Jackson*, 96 U. S. 727, 737.

DECEIT — NEGLIGENCE AS SUBSTITUTE FOR INTENTIONAL UNTRUTH — LIABILITY OF NATIONAL BANK DIRECTORS. — The defendant, a director of a national bank, participated in the report of the financial condition of the bank required by statute. The report was in fact false, and the plaintiff acted thereon and suffered damage. *Held*, that the defendant is liable only if he published the report with knowledge of its falsity. *Yates v. Jones Nat'l Bank*, 206 U. S. 158.

Apart from statute it would seem that liability would attach if there was no honest belief in the truth of the report. See *Derry v. Peek*, 14 App. Cas. 337. The National Bank Act requires the publication of a verified report, and provides that every director who knowingly participates in the violation of any provision of the act shall be liable. 3 U. S. COMP. STAT. 1901, §§ 5211, 5239. And the present case holds that this statute excludes common law liability for any violation of the duties expressly imposed thereby, and that *scienter* must be shown to maintain an action. The case is in conflict with several prior decisions. It has been held that a director is an insurer of the truth of his

report. *Gerner v. Mosher*, 58 Neb. 135. And, on the other hand, negligence has been held essential to sustain a recovery. See *Mason v. Moore*, 73 Oh. St. 275. As national banks are federal institutions, it seems desirable that the liability of their directors should be uniform. The present construction, by making that liability depend upon federal statutes, insures this uniformity in the future regardless of the local laws of the individual states.

DEEDS — BOUNDARIES — LAND BOUNDED ON PRIVATE WAY. — Land conveyed was described as bounded "on a passageway." The grantor owned the way mentioned, but no land beyond. *Held*, that the deed conveys the fee to the centre of the way. *Gould v. Wagner*, 41 Banker and Tradesman 689 (Mass., Sup. Ct., Oct. 15, 1907).

This case follows the general rule that a deed naming as a boundary a public or private way owned by the grantor conveys title to the centre of the way. *Gould v. Eastern R. R. Co.*, 142 Mass. 85. Only an express intention will limit the grant to the side of the way. *Salter v. Jonas*, 39 N. J. L. 469; *contra*, *Buck v. Squiers*, 22 Vt. 484. In the present case, however, since the grantor owned no land beyond the way, the court might well have sustained a presumption that he did not intend to retain any portion of the way. This presumption is reasonable, for it is unlikely that the grantor would reserve a strip of land of use only to the grantee. *Haberman v. Baker*, 128 N. Y. 253. Furthermore, on grounds of public policy this construction should be applied to such conveyances to prevent the existence of innumerable narrow strips of land, title to which is always difficult to ascertain because the owner is never in possession. *In re Robbins*, 34 Minn. 99. But where the grantor would preserve riparian rights by retaining one-half his highway, the presumption of intent to convey the whole way should be rebutted. *Contra*, *Johnson v. Grenell*, 188 N. Y. 407.

DIVORCE — ALIMONY — RIGHT TO MODIFY DECREE ADOPTING SEPARATION AGREEMENT. — The plaintiff and the defendant, pending a libel for divorce, made an agreement under which the plaintiff was to receive \$6000 and relinquish all her claims for alimony. This agreement was adopted by the court in the decree. Subsequently the plaintiff sought a modification of the decree giving her more alimony. N. H. Rev. Stat. 1843, c. 148, § 16, allows the courts on proper application to make such new orders as may be necessary respecting alimony. *Held*, that the court may modify the decree. *Wallace v. Wallace*, 67 Atl. 580 (N. H.).

The objections to recognizing the agreement, so as to preclude the plaintiff from applying for additional alimony, are as follows: first, that such contracts are against public policy because they tend to facilitate collusive divorce and because the amount of alimony may be inequitable; and second, that a married woman cannot contract at common law. But the court's decree in accordance with the agreement removes the first objection, as it is the duty of the court to see that the divorce is free from collusion, and that the provisions for alimony are fair. *Julier v. Julier*, 62 Oh. St. 90. So in states where a married woman may contract, such an agreement and decree will prevent the husband from obtaining a reduction of the alimony, and the wife from obtaining an increase. *Martin v. Martin*, 65 Ia. 255; *Henderson v. Henderson*, 37 Ore. 141. Even in common law states separation agreements not against public policy are enforced in the wife's favor. *Calame v. Calame*, 25 N. J. Eq. 548; *Randal v. Randal*, 37 Mich. 563. No valid reason appears why a similar disregard of a married woman's incapacity to contract should not be made against her interest. Consequently, it seems that the court should not consider an application forbidden by the separation agreement.

EMINENT DOMAIN — WHEN IS PROPERTY TAKEN — RESTRICTIVE AGREEMENTS ON THE USE OF LAND. — Land subject to restrictive agreements in favor of the plaintiff was taken by eminent domain. *Held*, that the plaintiff has no right to compensation. *Wharton v. United States*, 153 Fed. 876 (C. C. A., First Circ.). See NOTES, p. 139.

INSANE PERSONS — GUARDIANSHIP AND PROTECTION — EFFECT OF DEATH OF LUNATIC ON LIABILITY OF RECEIVER'S SURETY. — C became surety for B as receiver for A, a lunatic. After A's death, B collected rents and absconded. *Held*, that C is not liable for B's defalcation. *In re Walker*, [1907] 2 Ch. 120.

The status of lunacy gives equity her jurisdiction to appoint a receiver of the lunatic's property. See *In re Fitzgerald*, 2 Sch. & Lef. 432. Since the death of the lunatic determines that status, the basis of equitable interference disappears, and consequently the receivership terminates. Hence a *quondam* receiver cannot charge, in his final accounting, indebtednesses incurred in administration of the estate after the lunatic's death. *Jones v. Noyes*, 7 Wkly. Rep. 21. And even when a statute required a formal accounting and final discharge by the court, the receivership was held to terminate by the death of the lunatic before the discharge. *In re Sheuer's Estate*, 31 Mont. 606. Upon the same principle, discharges given creditors by a man acting as administrator *durante absentia*, after the death of his principal, even though such death was unknown to all the parties, were held invalid. *Re Oury*, cited in 51 Sol. J. 479. In the present case C had agreed to answer for any default of B as receiver. But the receivership had terminated by the death of the lunatic before the collections were made; there was no default by B as receiver, and consequently any claim against the surety is without foundation.

INTERSTATE COMMERCE — CONTROL BY CONGRESS — INTERSTATE BRIDGES. Congress authorized the city of St. Louis to construct a railroad bridge across the Mississippi River, and to exercise the right of eminent domain for the acquisition of approaches thereto in Illinois. *Held*, that Congress has power to authorize the building of such interstate bridge, and to clothe St. Louis with the right to condemn property in another state. *Haussler v. City of St. Louis*, 103 S. W. 1034 (Mo., Sup. Ct.).

It is well settled that a bridge may be an instrument of interstate commerce. *Covington, etc., Bridge Co. v. Kentucky*, 154 U. S. 204. And in spite of the doubts expressed in many early cases, it has now been established by a long line of decisions that Congress, under its power to regulate interstate commerce, can build or authorize the construction of such bridges without the consent of the states, and to this end exercise its right of eminent domain. *Penn., etc., Ry. Co. v. Baltimore, etc., Ry. Co.*, 37 Fed. 129; *Cherokee Nation v. South Kansas Ry. Co.*, 135 U. S. 641. If the consent of the states were necessary, Congress would not have supreme power over an instrument of interstate commerce now as important as a navigable river. Consequently, it has been held constitutional for Congress to charter a corporation to build an interstate bridge, and to give it rights of eminent domain in both states without their consent. *Luxton v. North River Bridge Co.*, 153 U. S. 525. The present case, therefore, seems right in holding that, "if Congress can create a corporation with such rights, it can grant such rights to one already in existence."

INTERSTATE COMMERCE — ELKINS ACT — RECEIVING ILLEGAL CONCESSIONS FROM PUBLISHED RATES A CONTINUING CRIME. — The defendant shipper obtained concessions and delivered goods to the carrier in Kansas. The prosecution was instituted in a district of Missouri through which the goods were transported. *Held*, that the court has jurisdiction, since receiving such concessions is a continuing act. *Armour Packing Co. v. United States*, 153 Fed. 1 (C. C. A., Eighth Circ.). See NOTES, p. 135.

LIENS — STATUTORY LIENS — INNKEEPER'S LIEN ON PROPERTY NOT BELONGING TO GUEST. — N. Y. Laws 1897, c. 418, § 71, as amended by N. Y. Laws 1899, c. 380, provides that the keepers of inns and boarding-houses shall have a lien upon property brought upon their premises by a guest; but that no such lien shall exist if they had notice that the property did not belong to the guest. A guest brought to a hotel a piano, which was the property of the plaintiff, though the hotel-keeper had no notice of the fact. *Held*, that the hotel-keeper has a lien on the piano, available against the owner for the debt incurred by the guest. *Waters & Co. v. Gerard*, 189 N. Y. 302.

A former case in a lower New York court, in which a boarding-house keeper claimed a lien on property not owned by a guest, construed the words "property brought by a guest" to include only property belonging to the guest; this rather forced construction being adopted on the ground that to give a boarding-house keeper a larger lien would be unconstitutional, as taking the owner's property without due process of law. *Barnett v. Walker*, 39 N. Y. Misc. 323. The present case overrules this construction, holding that the words do confer a lien on the goods of a third person. The court is clearly right in holding that in its application to innkeepers the statute is constitutional, for at common law an innkeeper had a lien on property brought by a guest who had no title to it. *Yorke v. Grenaugh*, 2 Ld. Raym. 866; *Jones v. Morrill*, 42 Barb. (N. Y.) 623. Whether or not the statute, as here construed, is constitutional as far as it applies to boarding-house keepers is left in doubt. It seems, however, well within the legislative power to extend the law in the case of inns to the analogous case of boarding-house keepers. See 16 HARV. L. REV. 528.

LIMITATION OF ACTIONS — NATURE AND CONSTRUCTION OF STATUTE — DISABILITY CAUSED BY INJURY FOR WHICH ACTION IS BROUGHT. — The plaintiff sustained injuries to his head from which insanity almost immediately resulted. The action was brought after the statute of limitations had run. *Held*, that the provision of the statute in regard to disabilities existing at the time the cause of action accrues is applicable, and that the action is not barred. *Nebola v. Minnesota Iron Co.*, 112 N. W. 880 (Minn.).

It has been held that insanity resulting a few hours after an injury is not a disability existing at the time the right of action accrues within the meaning of a statute of limitations. *Roelefsen v. City of Pella*, 121 Ia. 153. The decision in the principal case, however, is supported by an earlier Texas decision. *Sasser v. Davis*, 27 Tex. 655. The question involved seems not to have been considered elsewhere. The periods fixed by statutory limitations usually date from the accrual of the action. WOOD, LIMITATIONS, § 54. As a general rule, however, in calculating these periods it is held that the day on which the action accrued is excluded, and that the running of the statute begins on the following day. *Seward v. Hayden*, 150 Mass. 158. Hence a disability arising shortly after the action accrues, but on the same day, exists when the statute begins to run, and by similar construction would fill the statutory requirement of "existing at the time the action accrued." This construction seems more just than to hold that insanity caused by an injury and resulting immediately after it is not a disability provided for by the statutes. See *Street Ry. Co. v. Mabie*, 66 Ill. App. 235, 239.

LOTTERIES — STATUTES — THE ELEMENT OF CHANCE. — The defendant offered certain rewards or prizes to the persons who should submit the nearest correct estimates of the popular presidential vote of 1904 and who should at the same time subscribe to a certain periodical. The plaintiff was the assignee of the claims of the two most successful contestants. *Held*, that the plaintiff cannot recover, as the enterprise is a lottery. *Waite v. Press Publishing Ass'n*, 155 Fed. 58 (C. C. A., Sixth Circ.).

Legislation regulating such transactions is very comprehensive, but the courts generally recognize that to constitute a lottery scheme three elements must concur: a consideration, a prize, and the allotment of the prize by chance. See *Equitable Loan, etc., Co. v. Waring*, 117 Ga. 599, 609. A recent English case shows the tendency to a very liberal construction in finding the first named essential, consideration. *Willis v. Young*, [1907] 1 K. B. 448. In their interpretation of the third element the English and American decisions are in some conflict on such facts as are presented in the present case. The former hold that the factor of human calculation renders negligible the element of chance. *Hall v. Cox*, [1899] 1 Q. B. 198. The weight of American authority, with better reason, it would seem, holds that chance is the dominant factor in arriving at the correct conclusion. *Stevens v. Cincinnati Times-Star Co.*, 72 Oh. St. 112; *People v. Lavin*, 179 N. Y. 164; *contra*, *U. S. v. Rosenblum*, 121 Fed. 180. That a competitor's ignorance of any of the causes which will

determine the exact result desired must leave the correctness of his estimate dependent, in the last analysis, on chance, seems too clear for argument.

MALICIOUS PROSECUTION — PROBABLE CAUSE — BONA FIDE MISTAKE OF LAW. — A tenant tore down the "To Rent" sign which her landlord's agent had hung in her window. The agent, an attorney, unsuccessfully prosecuted her under a statute which made criminal the severance of fruits, crops, etc., "or anything," from the freehold. *Held*, that the agent had probable cause for the prosecution. *Whipple v. Gorsuch*, 101 S. W. 735 (Ark.).

The plaintiff, through the false representation that he was a Roman Catholic priest collecting funds for the building of a Roman Catholic church, obtained money wherewith he built an Old Catholic church. The defendant unsuccessfully prosecuted him for obtaining money by false pretenses. *Held*, that the defendant had no probable cause for the prosecution. *Urban v. Tysska*, 64 Leg. Int. 411 (Pa., Washington Co. C. P., April 23, 1907).

The question of probable cause depends largely upon the particular facts of each action for malicious prosecution; it is dangerous to generalize as to what a man of reasonable prudence and caution would or would not do. Some dicta suggest that he would never make a mistake of law. See *Hassard v. Flury*, 120 N. Y. 223; *Hall v. Hawkins*, 24 Tenn. 357. In most of such cases the defendant had prosecuted the plaintiff for larceny of goods taken under a claim of right, or the defendant's belief in the plaintiff's guilt arose from some similar gross mistake of law. Where, however, the defendant misapprehended a doubtful point of law, he may still be considered to have acted with reasonable prudence and hence with probable cause. *Phillips v. Naylor*, 4 H. & N. 565. This view seems correct logically, and as a matter of public policy. Both the present decisions appear doubtful in the light of the facts, but the Arkansas holding illustrates the more commendable tendency. It cannot be said that he who institutes a prosecution is always bound at his peril, if a layman, to consult an attorney, if a lawyer, to know the law.

MUNICIPAL CORPORATIONS — MUNICIPAL DEBTS AND CONTRACTS — MORTGAGE OF STREET RAILWAYS PAYABLE FROM THEIR INCOME CONSTITUTING DEBT. — The Illinois constitution limits city indebtedness. In purchasing street railways Chicago issued \$75,000,000 of certificates payable solely from the income of the railways, and secured by a mortgage of the railway property, the purchaser at foreclosure being given the right to operate the railways for twenty years. *Held*, that this issue of certificates constitutes a debt within the constitutional provision. *Lobdell v. Chicago*, 227 Ill. 218.

The policy underlying limitations on indebtedness is that future taxpayers shall not be unduly burdened. See 16 HARV. L. REV. 442. A loan secured by a purchase-money mortgage does not constitute a debt to which the limitation applies. *Winston v. Spokane*, 12 Wash. 524. But it has been held that hypothecation of stock creates a debt, although the pledgee has no recourse against the city. *Mayor v. Gill*, 31 Md. 375. That case differs from the present, for it appears that the city there contemplated "returning" the money from its general funds. Further, a loan, to be repaid solely from the income of existing waterworks, and secured by a mortgage on the waterworks, has been held a debt. *City of Joliet v. Alexander*, 194 Ill. 457. This decision, however, has been questioned. See 34 Nat. Corp. Rep. 325. And the present case goes much further, since the threatened increase, if any, in taxation seems very remote. The city has executed a purchase-money mortgage which admittedly creates no debt; in addition it has granted a franchise contingently which it had the right to grant absolutely and gratuitously. *Roby v. Chicago*, 215 Ill. 604. The transaction, therefore, seems to throw no additional burden on the taxpayers, and consequently should not be considered a debt prohibited by the constitution.

MUNICIPAL CORPORATIONS — TERRITORIAL LIMITS AND SUBDIVISIONS — GRANTING MUNICIPALITY POWER OUTSIDE ITS CORPORATE LIMITS. — The state legislature granted to the city of Memphis general police power for the purposes of sanitation and health ten miles beyond the city limits, and complete

governmental and police power for all purposes for two miles beyond. *Held*, that both provisions violate the clause of the state constitution which prohibits deprivation of liberty without due process of law. *Malone v. Williams*, 103 S. W. 798 (Tenn.).

It is clear that two distinct municipal corporations cannot exercise the same power at the same time within the same territories. *Taylor v. Fort Wayne*, 47 Ind. 274, 281. But the state as sovereign may within proper limits delegate its power to a municipality, and when such a delegation is in conflict with a former grant the latter is impliedly revoked. See *Patterson v. Society*, 4 Zab. (N. J.) 385, 399. Such extension of jurisdiction has been most frequent for the purpose of regulating liquor traffic, and has been upheld for such purpose to the extent of four miles. *Jordan v. Evansville*, 163 Ind. 512. The power thus delegated must, however, have reference to the welfare of such municipality. *Falmouth v. Watson*, 5 Bush (Ky.) 660. Moreover, the delegation to a municipality of any unreasonable or oppressive power over those outside its limits, who have no voice in the corporate affairs, must be regarded with apprehension as a deprivation of liberty without due process of law. It is clear that while such extension of power might be proper in the case of a large city surrounded by sparsely settled country, it would be unjustifiable where two populous cities were contiguous. And the decision in the present case declaring the proposed grant unreasonable seems sound.

PATENTS — INFRINGEMENT — CONTRIBUTORY INFRINGEMENT. — The patentee of a talking-machine had no patent on the sound-producing records used with the machine. The defendant manufactured and sold records solely for the use of purchasers of the talking-machines. *Held*, that the sale of the records may be enjoined. *Leeds & Catlin Co. v. Victor Talking Machine Co.*, 154 Fed. 58 (C. C. A., Second Circ.).

The doctrine of contributory infringement usually prohibits the sale of unpatented parts of a patented combination, or unpatented articles which are of value only when used in combination with the patented article. *Thomson-Houston Electric Co. v. Kelsey, etc., Co.*, 75 Fed. 1005. The result, as pointed out by the dissenting opinion, is the creation of a monopoly of an unpatented article. But purchasers of patented articles have the right of repair and supply, and it is therefore held that the sale to them of short-lived incidental articles cannot be enjoined. *Morgan Envelope Co. v. Albany, etc., Co.*, 152 U. S. 425. In the present case the court bases its decision on the permanent nature of the records. The better test seems to be that of the practical comparative permanency of the patented and the unpatented article. See *Morgan Envelope Co. v. Albany, etc., Co.*, *supra*, 433. Records of a talking-machine do not wear out quickly, and are therefore permanent in that sense, but not in another, since in practice they are periodically renewed. The case seems doubtful, therefore, even granting the soundness of enlarging the monopoly of the patent in the case of truly permanent auxiliary articles. *Cf. Wilson v. Simpson*, 9 How. (U. S.) 109.

POST-OFFICE — POWER TO WITHHOLD MAIL PENDING INVESTIGATION OF FRAUD CHARGES. — The Postmaster-General issued an order withholding the complainant's mail for six weeks, pending the investigation of a charge of fraud. *Held*, that he is exceeding his power. *Donnell Mfg. Co. v. Wyman*, 4 The Law 807 (Circ. Ct., E. D. Mo., Sept. 2, 1907).

This case seems the first to define the powers of the Postmaster-General in this matter. He is authorized on evidence of the addressee's fraud, "satisfactory to him," to order mail returned. U. S. COMP. STAT. 1901, § 3929. But it is questionable if he may withhold mail even for a limited time, before he is satisfied of fraud. It may be urged, on the one hand, that the statutory grant of power includes authority to do whatever is necessary to make effectual the object of the grant. See *Mayor v. Sands*, 105 N. Y. 210, 218. And, as the object is to prevent fraudulent use of the mails, not to imply the power would to a degree defeat the object of the statute, for the addressee, pending an investigation, would reap the benefit of his fraud. On the other hand, it may be argued that whenever a statute gives a right and names a remedy, it impliedly

excludes all other remedies. BISHOP, WRITTEN LAW, § 249. The legislative intention was indeed to prevent fraudulent use of the mails, but only in a specified way; that is, by returning the mail *after* the Postmaster-General is satisfied of fraud. *New Orleans Nat'l Bank v. Merchant*, 18 Fed. 841. But even if the power may be implied, its exercise in the present case is excessive.

QUASI-CONTRACTS — NATURE AND SCOPE OF THE OBLIGATION — RECOVERY UNDER ILLEGAL CONTRACT. — The plaintiff agreed to construct a hotel according to plans which called for a roof of a pitch forbidden by statute. Before any work was done on the roof, the plaintiff disaffirmed the contract and sued for the value of the work and materials furnished for the lower part of the hotel. *Held*, that the plaintiff may recover. *Eastern Expanded Metal Co. v. Webb Granite and Construction Co.*, 81 N. E. 251 (Mass.). See NOTES, p. 137.

WILLS — CONSTRUCTION — RIGHTS OF RESIDUARY LEGATEE AND NEXT OF KIN. — A fund was left to C for life, with power of appointment by will. C died without exercising the power. *Held*, that the fund goes to the next of kin of the original testator, and not to his residuary legatee. *Walton v. Walton*, 67 Atl. 397 (N. J., Ct. of Ch.).

The law is opposed to any construction of a will that produces partial intestacy. *Kenaday v. Sinnott*, 179 U. S. 606. The distinction formerly drawn that lapsed or void devises went to the heirs as intestate estate, though similarly unenforceable bequests of personalty fell into the residuum, has been abandoned. *Freme v. Clement*, 18 Ch. D. 499; *Molineaux v. Reynolds*, 55 N. J. Eq. 187. And the rule has always been practically universal that not only lapsed or void legacies, but also all interests in personal property not specifically disposed of by will, go to the residuary legatee. *In re Bagot*, [1893] 3 Ch. 348; *Riker v. Cornwall*, 113 N. Y. 115. In view of these authorities no satisfactory reason is seen to justify the construction of the present case that the reversionary interest of the testator, although subject to C's power of appointment, is not included in the residuary clause. Regarded solely as a question of the testator's intention, the construction of intestacy is possible. The case, therefore, disregards well-settled rules of construction to give effect to the court's opinion of what the testator intended to convey by the residuary clause.

BOOKS AND PERIODICALS.

I. LEADING LEGAL ARTICLES.

TERMINABLE DEDICATION BY LESSEE FOR YEARS; ESCHEAT AND THE DOCTRINE OF BONA VACANTIA — A recent article, suggested by a dictum in a late English case, discusses the validity of an attempted dedication by a lessee for years within the limits of his term. *Dedication of Land to Public Use by Lessees for Years* Anon., 51 Sol. J. 509 (June 1, 1907). As the writer correctly states, no English case — and we might add, no American case — decides the question squarely, but the dictum, in accord with a statement in an earlier case,¹ is to the effect that the lessee cannot give his term to the public, because dedication must be perpetual. Accepting, without establishing this requisite, the writer, after analogizing escheat and reversion, on the theory that escheat is a proprietary right, insists that dedications by tenants in fee under dependent tenure and by lessees for years do not bind the overlords and reversioners, and that these attempted dedications are, therefore, terminable and invalid. Indeed, to satisfy his test of perpetual duration, — in fact, to make

¹ *Dawes v. Hawkins*, 8 C. B. (N. s.) 847, 856.

dedication possible, — the writer is forced to regard the right of the sovereign to real property of an intestate without heirs, not as proprietary, but as governmental or prerogative, standing on the same footing as the sovereign's rights to *bona vacantia*.

With reference to the principal question, whether a lessee for years can dedicate for his term, there is, in general, agreement in the cases and text-books that ownership by the dedicator² and the unlimited duration³ of the gift to the public are self-evident essentials of dedication. But the very readiness of the authorities to assume these requisites has resulted in impoverishing the theory of dedication. For, though it is clear that the lessee should not be able to bind the lessor by dedication without his actual or presumed assent,⁴ it is not at all clear on principle why a lessee should not be able to dedicate within the limits of his term. Two cases leave the question open;⁵ a dictum of a third suggests that there can be dedication for a limited period;⁶ but none of these cases attempts to elaborate a principle. By analogy it might be urged that, as prescription for a term of years is not allowed by the law,⁷ there should not be dedication for a term. But dedication is by gift, not by prescription. Moreover, the very doctrine of dedication was adopted and developed within the last two hundred years⁸ because the theories of easements in aid of public or quasi-public rights were found inadequate.⁹ Rules of prescription, therefore, should not be applied to dedication. Another objection to the lessee's limited dedication might possibly be the effect on the reversion. So long, however, as waste is not committed, the reversioner's rights do not seem to be prejudiced.¹⁰ Finally, it is arguable that a terminable dedication would, at the expiration of the term, frequently embarrass the public who had enjoyed and relied on the continuance of the dedication. This argument is cogent, and rests, it is submitted, on what is the fundamental consideration in dedication — whether it is good public policy to accept the gift. Judged by this test, dedications should be permanent. Permanence, however, should mean simply the sort of duration which the tenant in fee has always been able to give to his dedication — not perpetuity in the strict sense employed in the article.

Even in that scholastic sense, it might be possible to contend that dedications by owners in fee under dependent tenure are perpetual, because they may bind the mesne lord or sovereign taking by escheat.¹¹ The writer of the article, however, is willing to assume that the overlord takes the escheated fee free from all dedications, so that, as said before, dedications fulfil the test of perpetuity only under a system of absolute ownership, which the writer adopts as the modern theory of real property in England. According to his theory the reason why the sovereign takes subject to the dedication is that his right to the real property of an intestate without heirs is prerogative, like rights to *bona vacantia*. The writer accepts this extreme position, denying the existence of escheat, because he fears that the analogy between escheat and reversion furnishes a basis for deducing the validity of a terminable dedication by a lessee for years from the dedication by an owner in fee terminable by the remote possibility of escheat, as indicated above. But it is to be observed that reversion and escheat, since the statutes of Edward I prohibiting subinfeudation,

² *Klug v. Jeffers*, 88 N. Y. App. Div. 246; *Bushnell v. Scott*, 21 Wis. 451; note to *State v. Trask*, 27 Am. Dec. 559; *Angell, Highways*, 3 ed., § 134.

³ *San Francisco v. Canavan*, 42 Cal. 541, 553; *Ward v. Davis*, 3 Sandf. (N. Y.) 502; *Dawes v. Hawkins*, *supra*.

⁴ *Harper v. Charlesworth*, 4 B. & C. 574; *Wood v. Veal*, 5 B. & Ald. 454. Cf. *Rex v. Barr*, 4 Campb. 16.

⁵ *Vanatta v. Jones*, 42 N. J. L. 561; *Atty.-Gen. v. Biphosphated, etc., Co.*, L. R. 11 Ch. 327.

⁶ *Wood v. Veal*, *supra*.

⁷ *Wheaton v. Maple & Co.*, [1893] 3 Ch. 48.

⁸ See *Gowen v. Phila. Exch. Co.*, 5 Watts & S. (Pa.) 141.

⁹ See 16 HARV. L. REV. 335.

¹⁰ Cf. *Baxter v. Taylor*, 4 B. & Ad. 72.

¹¹ See *Casey's Lessee v. Inloes*, 1 Gill. (Md.) 430, 507; 4 L. Quar. Rev. 318, 329.

are not analogous.¹² Equally certain it seems that, however desirable may be the substitution of allodial ownership for dependent tenure in England, it is to be realized by legislation, not to be adopted for a writer's purposes.¹³ Until such legislative change, it is unwarrantable to reason from the sovereign's right to personalty as *bona vacantia* to realty in general. For in England the sovereign never took realty by prerogative except in the case of alienage and when entitled to derelict land as universal occupant.¹⁴ In the United States, however, as many states have abolished tenure by legislation, they take realty of an intestate without heirs as *bona vacantia*, in the absence of escheat statutes.¹⁵

DE FACTO OFFICERS WITHOUT A DE JURE OFFICE. — When the charter of a long existing municipal corporation is declared unconstitutional so that the corporation can no longer be said to exist with any color of right as a *de facto* body, are the past acts of its officers valid as to third persons? Clearly, were all their acts void, there would be endless confusion. A recent article considers the practical importance and the authority on this question, and argues that such acts should be valid as to third persons — a contention which opposes the view of text-book writers.¹ *De Facto Office*, by K. Richard Wallach, 22 Pol. Sci. Quar. 460 (September, 1907).

There arises here more than the simple question, whether a man improperly chosen to a public office legally existing can ever do acts which are binding as to third parties, for there is here no office *de jure*. In considering the cases covering the situation, Mr. Wallach indicates that although there is a strong current in the law that the acts of men holding such offices are always void, yet that the exact point decided in all but one of the cases does not involve such a conclusion. He considers that the cases fall into two classes: those where *de facto* officers are wrongly holding an office, the legal existence of which is unquestioned, so that any dicta that an office *de jure* is essential are irrelevant; and those where, although no office *de jure* exists, yet it appears that the man acting could not be held a *de facto* officer in any case,² not having that color of authority which is necessary even in the case of a *de jure* office to make valid the acts of one holding office irregularly. It is not clear that in this second class the court's pronouncement is entirely *obiter*, for the fact that they take the trouble to find that no *de jure* office exists shows that their decision depends as well on that fact as on the lack of color of authority in the would-be officer's title — an authority which in several of Mr. Wallach's cases was seemingly presumed by the court,³ although perhaps erroneously according to a strict analysis of the facts. It is possible, however, that some of these cases are distinguishable on a further ground. As Mr. Wallach points out, the principal reason of public policy for holding the acts of *de facto* officers valid as to third persons is the necessity of protecting the public in dealing with their government. It is submitted that in a criminal case the steady policy of the law to give a criminal every chance might very well override the ordinary rule of public policy, and that such a defendant should be allowed to set up the illegal existence of the office of those trying him,⁴ though he could not question the authority of a *de facto* officer in a *de jure* office.⁵ The difference between the

¹² 2 Pollock & Maitland, Hist. Eng. Law, 22, 23.

¹³ See 4 L. Quar. Rev. 318; 42 L. J. 440.

¹⁴ See *Ex parte* Lord Gwydir, 4 Madd. 281; 4 L. Quar. Rev. 318.

¹⁵ See Gray, Rule Perp., 2 ed., 170 n.

¹ Dillon, Mun. Corp., 4 ed., § 276; Mechem, Public Offices and Officers, § 324.

² Norton v. Shelby County, 118 U. S. 425; criticized in 11 HARV. L. REV. 266.

³ *Ex parte* Babe Snyder, 64 Mo. 59; Decorah v. Bullis, 25 Ia. 12.

⁴ *Ex parte* Babe Snyder, *supra*; State v. O'Brian, 68 Mo. 153; Petition of Hinkle, 31 Kan. 712; Matter of Quinn, 152 N. Y. 89. See also *Ex parte* Giambonini, 117 Cal. 573.

⁵ State v. Carroll, 38 Conn. 449; *In re* Ah Lee, 5 Fed. 899; *Ex parte* Strang, 21 Oh. St. 610.

two cases, although, as Mr. Wallach would contend, immaterial in general, might sway the balance in a criminal case. It is therefore significant that four of the nine cases cited by Mr. Wallach in his second class are criminal.

As regards the cases in accord with his view, he collects many strongly in point to show that the fact that no office was legally in existence does not conclude the question as to the validity of its incumbent's acts, — as when taxes were laid after a city charter had run out,⁶ or when damages were given by a lower court, illegally existing, from which an appeal had been taken,⁷ etc. To this list might be added a Massachusetts case, where the legislature created an office to begin in future and one elected to it acted before that day.⁸ On strict analysis of the facts reported, only one case⁹ is opposed to Mr. Wallach's view, and he shows the inequitable result of the court's decision, that the license of the defendant granted by commissioners acting with color of authority in an illegal office, was no answer to an indictment for illegal liquor selling.

In collecting the cases Mr. Wallach refers to a situation analogous in fact to that under discussion, "where there is no constitutional office in existence, but where the officer is protected both from collateral and direct attack on the ground that his office is part of a municipal organization which is in existence unattacked by the state." The cases on this point go very far in applying the general rule of public policy that admittedly validates the acts of *de facto* officers in a *de jure* office. The conclusion that the rule should also be extended to cover the analogous case where there is color of authority in an existing office, though no office *de jure*, seems justified. Therefore the question under discussion may be decided in the way that will protect the public as to the outcome of their past dealings with officers of government, acting with such color of authority as justified these dealings, not only on principle, but also in accordance with the weight of authority.

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- ADVERSE POSSESSION, TITLE BY. *Charles Stuart*. Maintaining that restrictive covenants are binding on one who gets title by adverse possession even though not binding on a disseisor. 19 Jurid. Rev. 66. See 21 HARV. L. REV. 139.
- BANKRUPTCY (SCOTLAND) BILL, 1907, THE. *I. W. W.* Summarizing the bill. 23 Scot. L. Rev. 248.
- BANKRUPTCY, CORPORATIONS SUBJECT TO. *R. Jackson Cram*. Enumerating the classes of corporations that come within the terms of the National Act. 19 Green Bag 529.
- BILLS OF LADING, THE LAKE SITUATION AND. *Anon.* Contending that bills "care consignee" are not good security. 24 Bank. L. J. 697.
- COMMON EMPLOYMENT, THE DOCTRINE OF, IN ENGLAND AND CANADA. *J. P. McGregor*. A study in comparative legislation and jurisprudence. 6 Can. L. Rev. 24, 61, 110, 158, 324.
- COMMON LAW, THE INFLUENCE OF NATIONAL CHARACTER AND HISTORICAL ENVIRONMENT ON THE DEVELOPMENT OF THE. *James Bryce*. 19 Green Bag 569.
- COMPENSATION FOR MINERALS UNDER A RAILWAY. *Anon.* Reviewing the cases on a railway's right of support in adjacent minerals. 51 Sol. J. 684.
- COMPETITION, LEGISLATIVE AND JUDICIAL DEVELOPMENT OF, CONTRASTED. *Merritt Starr*. Adversely criticizing the legislation. 40 Chi. Leg. N. 7, 16.
- COMPETITIVE BIDDING IN LETTING MUNICIPAL CONTRACTS FOR STREET PAVING WHEN PATENTED OR MONOPOLIZED ARTICLES OR MATERIALS ARE INVOLVED, AS A PHASE OF THE CASE OF THE WILL OF THE LAW *v.* THE WILL OF THE JUDGE. *Eugene McQuillin*. 65 Cent. L. J. 198.
- CONSTITUTION, THE NATION AND THE. *Charles F. Amidon*. Contending that the interpretation of the Constitution should change with changing conditions. 19 Green Bag 594.

⁶ *Adams v. Lindell*, 5 Mo. App. 197; aff. 72 Mo. 198.

⁷ *Burt v. Winona*, etc., Ry. Co., 31 Minn. 472; *contra*, *Norwood v. Louisville*, etc., R. Co., 42 So. 683 (Ala.); criticized in 20 HARV. L. REV. 580.

⁸ *Fowler v. Bebee*, 9 Mass. 231. Add also *Riley v. Garfield*, 58 Kan. 399.

⁹ *Flaucher v. Camden*, 56 N. J. L. 244.

- CORPORATIONS AND THE COMMERCE CLAUSE.** *Smith W. Bennett.* Discussing the power of Congress to create corporations to engage in interstate commerce and to deny that power to the states. 52 Oh. L. Bul. 379.
- CROSS-EXAMINATION (Continued).** *Anon.* Stating clearly the principles in force in the English courts. 71 J. P. 385, 397, 409.
- DAMAGES, ACCIDENT INSURANCE AS AFFECTING THE MEASURE OF.** *J. Campbell Lorimer.* Contending that the rule that accident insurance should not be deducted from damages ought to apply to the case of injuries causing death. 19 Jurid. Rev. 58.
- DAMAGES, ALLOWANCE OF SPECIAL, IN ACTIONS FOR WRONGFUL DISMISSAL OF SERVANTS.** *C. B. Labatt.* Collecting the authorities on the allowance of consequential and incidental damages. 43 Can. L. J. 593.
- DEDICATION OF LAND TO PUBLIC USE BY LESSEES FOR YEARS.** *Anon.* 51 Sol. J. 509. See *supra*.
- DE FACTO OFFICE.** *K. Richard Wallach.* 22 Pol. Sci. Quar. 460. See *supra*.
- DIPLOMATIC PROTECTION OF CITIZENS ABROAD (Continued).** *M. Gaston de Leval.* Suggesting a system to ensure protection. 42 L. J. 607.
- DIVORCE DECREES, FOREIGN, IN NEW YORK.** *Raymond D. Thurber.* Attempting to reconcile *Atherton v. Atherton* with *Haddock v. Haddock*. 10 Bench and Bar 82. See 19 HARV. L. REV. 586.
- DYING DECLARATIONS.** *Wilbur Larremore.* Contending that under modern conditions this exception to the hearsay rule should be as restricted as possible. 41 Am. L. Rev. 660.
- EVIDENCE, WHEN IS A COMPLAINT BY THE PERSON AGAINST WHOM AN OFFENCE IS ALLEGED TO HAVE BEEN COMMITTED ADMISSIBLE IN?** *William C. Maude.* 71 J. P. 411.
- EXECUTIVE CONTROL OF THE LEGISLATURE, THE (Concluded).** *James D. Barnett.* Collecting the cases on the executive's veto power. 41 Am. L. Rev. 384.
- FELLOW SERVANTS' LAW, PROPOSED CHANGES IN THE.** *George Rice.* Contending that the fellow-servant doctrine should be abolished in the case of railroads. 52 Oh. L. Bul. 298.
- ILLEGALITY OF THE ACTION OF THE CIRCUIT COURT OF THE UNITED STATES IN ENJOINING THE VIRGINIA STATE CORPORATION COMMISSION FROM ENFORCING A TWO CENT RATE AFFECTING THE INTRA-STATE BUSINESS OF RAILROADS.** *E. Hilton Jackson.* Arguing that the proceedings of the commission were judicial, and therefore should not have been restrained. 13 Va. L. Reg. 417.
- INJUNCTIONS AGAINST STRIKES, BOYCOTTS, AND SIMILAR UNLAWFUL ACTS.** *F. C. Donnell.* General discussion. 65 Cent. L. J. 273.
- INTERNATIONAL LAW, THE NEED OF POPULAR UNDERSTANDING OF.** *Elihu Root.* 1 Am. J. of Int. L. 1.
- LEGACIES, APPROPRIATION OF TRUST FUNDS TO.** *William C. Smith.* Discussing the right of an executor to appropriate part of testator's estate to pay one legatee before the others. 19 Jurid. Rev. 19.
- MORTGAGES AND FIXTURES.** *Anon.* Collecting the recent English cases on the rights of a conditional vendor. 51 Sol. J. 567. See 20 HARV. L. REV. 565.
- MUELLER LAW DECISIONS, THE.** *Anon.* Adversely criticizing the Illinois decision that the issue of municipal bonds secured by a railway franchise increased the city's debt. 34 Nat. Corp. Rep. 325. See 21 HARV. L. REV. 149.
- NEGOTIABLE INSTRUMENTS LAW, EFFECT OF, ON LIABILITY OF THE SURETY.** *T. A. S.* Adversely criticizing a holding that under the act an accommodation maker signing as surety is not released by an extension to the principal. 11 L. N. (Northport) 105.
- NEWEST NEOLOGISM OF THE SUPREME COURT, THE.** *William Trickett.* Maintaining that the Supreme Court was wrong in saying in *Kansas v. Colorado* that the federal judiciary has more than enumerated powers. 41 Am. L. Rev. 729. See 21 HARV. L. REV. 47.
- NOTICE OF DISHONOR BY MAIL TO INDORSER IN SAME PLACE WHEN DAY FOLLOWING DISHONOR IS SATURDAY.** *Anon.* Contending that notice on a holiday is valid under the Negotiable Instruments Law. 24 Bank. L. J. 691.
- PART PAYMENT, THE EFFECT OF, AS AGAINST DEVISEES OF REAL ESTATE.** *I. Anon.* Maintaining that part payment of a debt should, as against devisees of the debtor's realty, waive the statute of limitations. 51 Sol. J. 407. See 19 HARV. L. REV. 57; 20 *ibid.* 332.
- PATENTS, SHOULD "PAPER PATENTS" BE ACCORDED FAVORABLE CONSIDERATION?** *Walker Banning.* Reviewing the authorities on the point. 40 Chi. Leg. N. 22. See 20 HARV. L. REV. 638.

- PERPETUITIES, THE LEGAL VALIDITY, AS CONTRACTS, OF OPTIONS TO PURCHASE NOT LIMITED TO THE PERIOD ALLOWED BY THE RULE AGAINST. *T. Cyprian Williams*. 51 Sol. J. 648, 669. See 20 HARV. L. REV. 240.
- POPULAR GOVERNMENT, GROWTH OF AMERICAN THEORIES OF. *Albert Bushnell Hart*. Tracing the development through various stages to the present supremacy of the decisions of the courts. 1 Am. Pol. Sci. Rev. 531.
- PRESIDENT'S ANNUAL ADDRESS. *Alton B. Parker*. Discussing the present trend of legislation to correct the abuses of corporate power and entering a plea for upholding the Constitution. 19 Green Bag 581.
- PUBLICUM BONUM PRIVATE EST PREFERENDUM. *Franklin A. Beecher*. Contending that under modern conditions the police power should be given extended application. 65 Cent. L. J. 79, 100, 119.
- QUI PRIOR EST TEMPORIS POTIOR EST JURE. *Anon.* Commenting on a recent English case on the relation between the *cestui* and an equitable mortgagee. 29 L. Stud. J. 200. See 21 HARV. L. REV. 53.
- SOCIOLOGICAL JURISPRUDENCE, THE NEED OF A. *Roscoe Pound*. Urging a scientific treatment of the present sociological tendencies. 19 Green Bag 607.
- SOVEREIGNTY IN A STATE, NOTES ON. Second Paper. *Robert Lansing*. Discussing the relation of state sovereignty to civil and state liberty, to constitutions, and to law. 1 Am. J. of Int. L. 297.
- SUPREME COURT, THE POWER OF THE, TO ENFORCE ITS DECREES. *George C. Lay*. Historical survey of the cases in which a state has refused to obey the Supreme Court decrees, and discussion of the possibility of enforcing such decrees today. 41 Am. L. Rev. 515.
- TRADE UNIONS AND TRUSTS, ATTITUDE OF THE STATE TOWARDS. *Henry R. Seager*. Contending for uniformity in treatment. 22 Pol. Sci. Quar. 385.
- TREATY-MAKING POWER, THE. *L. Atherley-Jones*. Contending that in England to-day the power to make treaties of alliance should not be so exclusively in the Cabinet. 42 L. J. 511.
- TREATY-MAKING POWER, THE EXTENT AND LIMITATIONS OF THE, UNDER THE CONSTITUTION. *Chandler P. Anderson*. An exhaustive historical review of the authorities. 1 Am. J. of Int. L. 636.
- TRIAL, THE EVOLUTION OF THE RIGHT OF. *Horace H. Lurton*. 52 Oh. L. Bul. 442.
- VERDICTS, THE POWER OF APPELLATE COURTS TO CUT DOWN EXCESSIVE. *Robert L. McWilliams*. Contending that the power should exist only when passion or prejudice is shown. 64 Cent. L. J. 267.

II. BOOK REVIEWS.

THE LAW OF TORTS. By Melville Madison Bigelow. Eighth Edition. Boston: Little, Brown, and Company. 1907. pp. xxxv, 502. 8vo.

When Dr. Bishop, in 1892, published his "New Commentaries on the Criminal Law" the work was described on the title page as:

"Eighth Edition"

"Being a New Work Based on Former Editions."

Professor Bigelow might well have followed this example. The so-called Eighth Edition of Bigelow on the Law of Torts is, in large part, a new work. The arrangement of topics is entirely changed; much matter has been added; and, most important of all, some questions of great consequence are viewed from a new standpoint. A large part of the first chapter on "Theory and Doctrine of Tort" has been rewritten. The remainder of the work is divided into two parts, the division being "based upon the special state of mind which caused the conduct in question." Part I (Culpable Mind) comprises cases where the defendant's liability "turns upon his special mental attitude (apart from volition in what was done or omitted)." Part II (Inculpable Mind) comprises cases where the defendant's liability "does not necessarily turn upon his special mental attitude (apart from volition in what was done or omitted)." The most important new matter is in Chapter VI, "Procuring Refusal to Contract," — a chapter wholly rewritten — and in Chapter VII, "Procuring Breach of Contract." The germ of this new matter is to be found in Professor Bigelow's very able contributions to the collection of essays recently published under

the title: "Centralization and the Law." See notice in 19 HARV. L. REV. 395. He now applies to concrete cases the theories there propounded.

An excellent condensed description of his way of looking at things is given in the preface:

"A new point of view has made its appearance out of the agitation of social movements, within the half dozen years since the last edition of this book was in hand. The struggle between equality and inequality—between the public and privilege, and between privilege as capital and privilege as labor—had not at that time proceeded far enough or long enough to make the meaning, much less the outcome, clear. . . .

"Since then the curtain has lifted somewhat and the social movement has found its place in the courts; though it is still uncertain whether equality or privilege will succeed in the end in making itself the will of the state. Even as it is, however, precedent is relaxing its hold under the pressure of the newer social energy, as some of the following pages will show. . . .

"The new point of view, which is that law must be regarded as the resultant of conflicting social forces (less the conservatism of courts and legislatures),—a point of view long hidden from sight in the faint stages of a social era of equality,—is reflected on many pages of this book as it now appears."

All lawyers will not concur in some of Professor Bigelow's conclusions as to the subjects discussed in Chapters VI and VII. But every candid man who has investigated those subjects must acknowledge that the learned author has rendered an immense service by distinctly bringing out vital issues which have not hitherto received proper attention. He has sensibly diminished the danger of future confusion from irrelevant or obscure discussions. We can recall no treatise which states some of these issues so clearly and withal so briefly. These chapters abound in short, crisp statements. Whether one agrees or disagrees with the special views of the author, one must admit that those views are forcibly stated. Witness the following extracts:

P. 238. ". . . any attempt to explain the newer authorities on hindering contract, on other grounds than of the struggle of social forces to make the law, is academic in nature and misleading in fact."

P. 249. ". . . a purpose to put an end to competition is not competition at all."

P. 250. ". . . the defense of competition does not extend to cases in which the defendant's purpose is to eliminate competition. . . .

". . . the doctrine of freedom of contract, both in economics and in law, has proved a delusion and has broken down. Legislatures have fully recognized the fact, and the courts are beginning to feel the pressure."

". . . if competition is to be kept from running into monopoly."

P. 262, n. 3. (As to certain decisions, now discredited.) "But they are interesting cases, standing as they are at the parting of the ways—uncertain of the real effect of the movement going on and so clinging to the past."

The earlier editions of this work held a high place among the treatises on this formerly neglected topic. Bigelow on Torts was always a good book, and now it is better than ever. It is said that the recent publication of so many volumes of cyclopedias and encyclopedias of law has affected the sale of standard text-books. We would not question the worth of the encyclopedias. Yet, in the investigation of special topics, such books can seldom be a satisfactory substitute for a standard treatise. The lawyer who has to answer an important question in torts will make a great mistake if he looks only at the encyclopedia and ignores the recent editions of Cooley and Bigelow. J. S.

THE LAW OF EVIDENCE. By Sidney L. Phipson. Fourth Edition. London: Stevens & Haynes. 1907. pp. lxxx, 704. 8vo.

Mr. Phipson is to be congratulated upon his book's having passed into its fourth lustrum of life coincidentally with its fourth edition. It is the best book now current on the law of evidence in England. Since the last edition more

than one thousand cases have been added, making in all some fifty-seven hundred cases and statutes cited, and these citations excel in their careful exhaustion of all the minor sources, such as the law journals, the *Times*, and the *Justice of the Peace* reports. At the head of each chapter is a list of references to the corresponding chapters in other treatises — a useful feature, which could have been improved by giving a table of abbreviations and editions used. The most valuable feature of Taylor's treatise, namely, the English statutory citations, now appears here also, with equal fulness. A casual testing finds no omission of the latest English decisions in courts of last resort. Indeed, the painstaking search for every vestige of a ruling is apparent on every page. As a lawyer's hand-book, it is difficult to suppose that this work can be improved upon.

As a scientific instrument for the geodesy of the law of evidence, this treatise makes no claims. It need not therefore be judged from that point of view. Otherwise it might be well worth while to break a friendly lance, after the manner of Sir Nigel Loring, over the author's amalgamation of the diverse rules against reputation and opinion (ch. xxv); the coördination of the rules of privilege for a third person's title-deeds, and the rules of discovery and of privilege for a party's documents (ch. xvi); and the treatment of that *instantia crucis* of evidence, the *Res Gestae* doctrine (ch. vi). It may be noted that Mr. Phipson, following Professor Thayer, cites John Horne Tooke's Case, in 1794, as the earliest occurrence of this phrase (p. 43); but it appears in fact more than a century earlier, in the Ship Money Case (3 How. St. Tr. 988), in 1637. The interesting point is that this earlier instance uses the plural *res gestae*, although Professor Thayer's favorite idea that the singular *res gesta* was the more correct was supposed to be confirmed by its being the earlier form.

Nevertheless, Mr. Phipson's work has thoroughly freed itself from the unreasoning conventions and meaningless fictions of the older law, and has taken careful account of all the established results of modern theory. In this respect his book should be highly valued by the practitioner for its safe and enlightening guidance. For example, under Burden of Proof (ch. iv), Best Evidence (ch. iv), *Res Inter Alios Acta* (ch. xi), and Parol Evidence (ch. xliiv), the great principles of analysis which Professor Thayer's writing and teaching succeeded in making popular and commonplace in this country are found plainly accepted as orthodox. If such changes in the literature of the most obstinate branch of the law can be effected so widely and so soon, through the single-handed labors of one man of science, we need not despair to behold in due season the successful leavening of all parts of our law by any doctrines, however radical, which can convince the profession of their soundness. J. H. W.

MARKETABLE TITLE TO REAL ESTATE By Chapman W. Maupin. Second Edition. New York: Baker, Voorhis & Company. 1907. pp. lxxvi, 910. 8vo.

"Marketable Title" is still known as the title which a court of equity will force a grantor to take at the suit of the seller. The use of this term is wide, and is kept constantly in mind by the more expert conveyancers, for in passing upon objections to title those are properly abandoned which would not cause a court to call it unmarketable. The learned author has dealt with this particular subject directly only in Chapter 31, pp. 705-791. The balance of the volume, some 800 pages, cuts across various topics of the law. An attempt has been made to cover more or less completely such remotely related subjects as suits for specific performance of contracts for the sale of real estate, covenants of title, estoppel by deed, various subjects of the law of damages and the law of contracts, as well as abstracts of title and the formal requirements of conveyances. One may reasonably wonder why he did not treat also of delivery, the recording acts, and the specific performance of contracts relating to real estate which are not in writing. But the author's aim, even if it were successful, might be criticized. The practitioner's power in dealing with a given problem is not increased by finding it treated in relation to a particular subject-matter, but

divorced entirely from its proper environment and associations. He is usually able to analyze his case and to locate the questions at issue in some scientifically analyzed topic of the law. He wants, then, the best treatise upon that fundamental subject. He wants to consider his particular problem in the light of the whole subject with which it is associated. He is necessarily repelled by a collection of topics such as the learned author has given us.

In the treatment of the various topics the author has in the conventional lines made excellent statements of the law, and set out with care conflicting views, with reliable, though not exhaustive, citations. It seems to us, however, that the author does not estimate the great difficulty of writing an authoritative and intelligent treatise on detached parts of many different fundamental topics. In some instances his failure is plain, — as where he attempts to deal with abstracts of title. With a topic having such a number of local variations he can do nothing effective in the space devoted to it. In other topics there is an utter failure to get hold of the best ideas upon the subject. Thus, observe in § 22 the loose way the author speaks of sealing as at common law, an indispensable formality in the execution of a deed of conveyance of a present freehold interest in possession. No one moderately acquainted with the history of conveying could ever have written such a sentence. To the transfer of a freehold in possession no seal was necessary at common law, for the conveyance would have been by feoffment. A writing and signature would only have been necessary by the Statute of Frauds of Charles II. If the instrument of conveyance operated by way of bargain and sale under the Statute of Uses of Henry VIII, then a seal was only necessary by the Statute of Enrolments of Henry VIII; but, as Tiedeman most clearly shows, it is extremely doubtful if the Statute of Enrolments has ever had any proper place in the law of this country, for its application was entirely local (Tiedeman, *Real Property*, 3 ed., § 549). Hence such a decision as *Jackson v. Wood* (12 Johns. (N. Y.) 73), which the learned author did not cite, holding that a seal is absolutely necessary, may be regarded as open to criticism. So, in respect to estoppel by deed, the learned author wholly misses the problem where A mortgages to B and then makes a second mortgage to C with full covenants of warranty but subject to the first mortgage, and upon foreclosure of the first mortgage A purchases the property. Is A or the second mortgagee entitled? He does indeed state the bare holding of *Rooney v. Koenig* (80 Minn. 483), but he fails entirely to note in this connection *Ayers v. Philadelphia Brick Co.* (159 Mass. 84, 3 Gray, Cas. on Property, 2 ed., 548) and the very interesting argument on principle that may be made the other way.

Another difficulty with the present work — a difficulty too which is met with in almost all the text-books of today — is this: the author seems to be writing upon the assumption that there is a sort of general American law which he is expounding. He seems to derive the propositions which he formulates by a process of induction in which the sources are a more or less second-hand familiarity with the general subject dealt with. When he comes to the citation of cases to illustrate his propositions, he does not seem to care where they come from so long as they support what is said. Sometimes there is a "conflict of authority." The learned author's course would have been all very well thirty years ago, when the law of no jurisdiction was anywhere near complete in itself, and when there were rules of the common law which all alike were likely to follow. But today in each of the larger and more important jurisdictions of the United States the adjudicated cases have made the law to a large extent complete in itself, and the sound and well-equipped lawyer must know the law in terms of the decisions of his particular jurisdiction, and know the particular problems which have developed there. To such practitioners the present work is a curiosity. It is not, like Wigmore on Evidence, a study of the comparative law of forty-five jurisdictions, pointing out the fundamental problems of the subject and indicating by exhaustive citations how far the decisions of each state conform to or depart from a usual or standard rule. It is, on the contrary, a composite as hazy, inexact, and curious in its outlines as the composite photograph of the hundred beauties of all nations.

A. M. K.

A DIGEST OF CORPORATION CASES. By Maurice B. Dean. New York: The Banks Law Publishing Company. 1906. pp. xxiv, 1087. 8vo.

The steady increase in the production of law books is apt to suggest to the inquiring mind whether or not publishers are not perhaps more anxious to keep their presses busy than to present to the public really valuable legal literature. This makes the reviewer sometimes sceptical, especially when an author departs entirely from the usual paths trodden by legal writers. Dean's "Digest of Corporation Cases" is a departure. It is based upon a frank repudiation of two well recognized methods of teaching legal principles. It is neither a text-book, because the author thinks that abstract principles of law are too easily forgotten, nor is it a case-book, because the author thinks that by its use the student must encounter too much useless material before reaching anything which he may acquire and carry away with him. It is a compromise between two methods. The author in his own words states the principle decided by a case, and appends in the language of the court what he deems to be its reasoning in deciding it. Two inquiries suggest themselves at once: (1) Has the author accomplished well the task he set himself to do? (2) Was the task worth doing at all? His selection of cases is good, but not large enough. In a number of instances where the law is in conflict, the author gives but one view. This is always misleading to the student. There should be enough cases to give the student not only what has been decided in a particular jurisdiction, but an opportunity to form a judgment for himself as to which of several views is correct. In the second place, the author has fallen into one of the errors about which he complains. In his statement of a decision, instead of confining himself to that part of the judgment illustrating the particular question of corporation law which he himself desires to illustrate, he inserts matters entirely extraneous. To be consistent he should strip his statement of facts, pleadings, and judgments of everything not essential to the complete understanding of the principle to be illustrated. But after all is said the task was not worth the labor involved. The author has not combined the best of two systems. He has simply created a book which might properly be labelled "The Study of Corporation Law Made Easy." Without entering into a discussion of the merits of the two systems of teaching law, it is quite clear, to one who has used the case-book method, that its weakness does not lie in the fact that the student must read "a large amount of useless material." A student properly trained to its use very quickly learns to discriminate between the essential and the non-essential. Books for students should not be written upon the principle that the subject treated must be brought by some mechanical method within the reach of the stupid and the slothful.

C. G. L.

LAW: ITS ORIGIN, GROWTH, AND FUNCTION. By James Coolidge Carter. New York and London: G. P. Putnam's Sons. 1907. pp. vii, 355. 8vo.

A TREATISE ON THE LAW OF NATURALIZATION OF THE UNITED STATES. By Frederick Van Dyne. Washington: Frederick Van Dyne. 1907. pp. xviii, 528. 8vo.

HANDBOOK OF THE LAW OF SURETYSHIP AND GUARANTY. By Frank Hall Childs. Hornbook Series. St Paul: West Publishing Company. 1907. pp. x, 572. 8vo.

HANDBOOK OF THE LAW OF EVIDENCE. By John Jay McKelvey. Second Edition, Revised. Hornbook Series. St. Paul: West Publishing Company. 1907. pp. xvii, 540. 8vo.

LEADING CASES ON THE LAW OF EVIDENCE. With Notes by Ernest Cockle. London: Sweet and Maxwell, Ltd. 1907. pp. xiii, 224. 8vo.

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NO. 3.

CONTEMPT OF COURT, CRIMINAL AND CIVIL.

THE subject of contempt of court, and especially of the punishment for contempt and the process by which punishment is inflicted, has been much discussed of late years. In the course of this discussion it has not always been kept clearly in mind that acts of different kinds have been grouped under this single heading of contempt of court, and as a result much has been urged on each side that might be largely modified by true apprehension of the legal facts. It is proposed in this article to distinguish between different kinds of contempt, and to suggest in connection with each the proper limits of action of the court in punishing.

The word "contempt" is a very old word to cover any act done in violation of a direct order of the king or of any governmental process. From the most ancient times any insult to the king or to his government was punishable as a contempt. Thus, in the time of Edward III persons were punished for contempt for going armed into the king's palace, and for contumaciously disputing the king's title as patron of a priory.¹ In the early years of James I it was held to be a heinous offense against the king to raise a false rumor that he intended to grant toleration to papists.² And in the fourth year of his reign two Catholic members of Parliament were attached for contempt to the king in not coming to Parliament at the time the gunpowder treason was intended.³ These are some early examples of a class of cases, never very numerous, where a direct insult to the king was dealt with as a contempt

¹ Oswald, *Contempt*, 1, 2.

² Cro. Jac. 38, Moore 756.

³ Lord Sturton's case, Noy 102.

either by indictment or by mere attachment, like the process issued by a court for contempt of itself.

It was not to the king alone that contempt was punishable. One case, at least, is on record where a contempt of the bishop by disturbance in church was punished.¹ Contempt of Parliament, also, was dealt with, and either house of Parliament could commit for contempt of itself.² We even have a reference to contempt of the king's officers.³ But of course the commonest and most important of all contempts in the eye of the law is the contempt of court. Contempt of the court is contempt of the lord of the court. Thus it was contempt of the admiral, and so of his court, to sue for a maritime cause in the king's court either of chancery or of common law,⁴ or in the courts of the church⁵ or of the city of London.⁶ So in a manorial court a contempt is contempt of the lord.⁷ In the well-known case of the committal of Prince Henry for contempt by Chief Justice Gascoyn, the learned Chief Justice said, "I keep here the place of the king, your sovereign lord and father, to whom ye owe double obedience."

Any act which interferes with the operation of the court itself, while engaged in the trial of cases, or which renders the court less able properly and with dignity to try cases, is a contempt of court entirely similar in kind to the contempt of the king by insults offered to him, or the contempt of Parliament by disturbance made therein. The typical case of this sort is actual disturbance made in the court itself which interferes with the process of litigation. Of such a sort was Judge Terry's contempt in the Hill divorce suit.⁸ In that case while the cause was being tried in a circuit court of the United States, the libellant, one Sarah Althea Terry, was guilty of misbehavior in the presence of the court; whereupon the court ordered that she be removed by the marshal. Her husband, an attorney of the court, assaulted and beat the marshal to prevent his carrying out the order of the court. This was done in open court, in the presence of the judges. Such an

¹ Carleton v. Hutton, Palm. 424.

² Murray's Case, 1 Wils. K. B. 299 (1751).

³ 18 Selden Soc. Pub. (Borough Customs), 107.

⁴ 11 Selden Soc. Pub., lxvii, lxviii.

⁵ Gorham v. Grainger, *ibid.*, lxviii.

⁶ Sandiford v. Fidele, *ibid.*, lxvii.

⁷ "Leaving their business undone, and in great contempt of the lord and of his bailiffs." 2 Selden Soc. Pub., 127.

⁸ *Ex parte Terry*, 128 U. S. 289.

act is obviously a contempt which every court has inherent power to punish summarily. A similar contempt was that dealt with in *Ex parte Wall*.¹ In that case the defendant with other persons riotously took from a jail a person accused of crime, during an intermission of the court which was trying him, and hung him from the limb of a tree directly in front of the court-house door, through which the judge passed on his way into court after intermission. This act was not only unlawful; it was a direct insult to the court itself. It was, as the Supreme Court said, perpetrated with audacious effrontery in the virtual presence of the court.

These acts are direct insults to the court itself in its presence. Any act, however, which directly obstructs the course of justice, though done outside the court, is equally a contempt of court. A typical instance of this sort of contempt was the action of the claimant and his friends in the Tichborne case. The Tichborne claimant, having failed in his action to get possession of the Tichborne estates, was indicted for perjury and was about to be tried at the bar of the Queen's Bench. He and his friends made public addresses in various parts of England, stating his side of the case, and denouncing the judges who were about to try the indictment as unfair and prejudiced. Several of the claimant's supporters were committed and fined for contempt of court as a consequence of these proceedings.² In the Skipworth case³ Judge Blackburn thus laid down the rule: "When an action is pending in the court and anything is done which has a tendency to obstruct the ordinary course of justice or to prejudice the trial, there is a power given to the courts by the exercise of a summary jurisdiction to deal with and prevent any such matter which should interfere with the due course of justice, and that power has been exercised, I believe, from the earliest times that the law has existed."⁴

A third class of active contempts of court consists in any interference with persons or property which are in the hands of the court. Such, for instance, is interfering with a receiver in the performance of his duty,⁵ or marrying a ward of court without

¹ 107 U. S. 265.

² *Regina v. Onslow*, L. R. 9 Q. B. 219.

³ *Regina v. Skipworth*, L. R. 9 Q. B. 230.

⁴ Modern instances of this sort where the extent of this power was carefully considered may be found in *Rex v. Tibbits*, [1902] 1 K. B. 77; *Globe Newspaper Co. v. Com.*, 188 Mass. 449.

⁵ *Langford v. Langford*, 5 L. J. (N. S.) Ch. 60.

license of the court.¹ Such contempts of court as have been described may be briefly summarized as committed by any act which insults the court or directly prevents it from pursuing its will in administering justice.

It has been generally assumed that all contempts of court are of the same sort, and consist in this disrespect to the representative of the king and interference with his action in office; but it is impossible either to understand the law of contempt or to deal satisfactorily with the modern problems that have arisen — in fact, it is impossible for a court to exercise properly the extraordinary power of punishment for contempt — without noticing that contempts of court, so called, are of two kinds, entirely different in origin. The so-called contempt of court which consists in mere disobedience to an order of the court is entirely different, both in its nature and in its origin, from that active contempt, whether in or out of court, which has been considered.

From the earliest times a refusal to obey an order of the king or of his officer, formally and expressly directed to a subject, has been regarded as a contempt. This, doubtless, was deemed a breach of allegiance. "*Contemptus brevium*" was declared by the laws of Henry I² to be an offense subjecting a person guilty of it to amercement. In the time of Henry II it was laid down that if a tenant duly summoned in the court was absent, the king or his justices might at their pleasure punish him for his contempt of court.³ So again, if the demandant in certain cases failed to produce his lord in court, "the body of the demandant himself should be attached on account of his contempt of court, and thus he shall be restrained to appear in court."⁴ This was equally true in the inferior courts. Thus it was contempt of the lord of a manorial court for a person owing allegiance to the court to depart from it without answering a complaint.⁵ And similarly a burgess was guilty of contempt in failing to appear at the proper time before the borough court.⁶ Among the acts of contempt of the Arches court was contempt "*in non parendo mandatis*."⁷ And further,

¹ *Eyre v. Countess of Shaftsbury*, 2 P. Wms. 102 (1722).

² C. 14.

³ Glanvill, B. 1, c. xxxiii (1187).

⁴ *Ibid.*, B. 2, c. vi.

⁵ 2 Selden Soc. Pub., 173 (1296).

⁶ 18 Selden Soc. Pub., 188 (Norwich, before 1340).

⁷ 16 Selden Soc. Pub., lxxix.

as we have seen, it was contempt of the admiral's court to refuse to sue a maritime cause in that court.¹

This contempt by mere disobedience was often joined, or was alleged to be joined, with an act of dishonor to the lord. Thus, where the contempt consisted in disobedience to the king's writ, a contemptuous treatment of his seal was usually charged. So, for instance, in a complaint to the chancellor in the time of Henry IV it was recited that a writ of injunction had been granted against suing at common law, "which writ, when a certain messenger delivered it to the said J. H. on behalf of our said Lord the King, . . . he would not open his hands to receive the same, and did no reverence to it, as he ought to every royal mandate; but he threw it under his feet where it lay for some time vilely trampled upon, until others took it up and placed it on the font of the said Church; and of this contempt committed by the said J. H. the said suppliant doth vouch to record J. C. . . . and besides this the said J. H. doth not cease still to sue the said suppliant [notwithstanding] the said royal mandate."² But it had very early come to be established that the mere disobedience to a writ under the king's seal was in itself contempt; so in the time of Henry IV it was alleged that a sheriff had been ordered by a writ of injunction to stay execution; nevertheless the said sheriff would not stay the execution, contrary to the tenor of the writ, and in contempt of our lord the king.³ In one case the chancellor was informed that one Richard Goldsmith received certain writs and letters under the king's privy seal, "in great contempt and despite and would do nothing in compliance therewith."⁴ And further, complaints were made to the king's council in Star Chamber for contemptuously disobeying privy seals of the king.⁵

Several instances of contempt of this sort grew out of licenses to English subjects to live abroad. Especially during the stormy times of the Reformation, Protestant or Catholic subjects, as the case might be, secured license to live abroad for a limited time, and there, as it was claimed, confederated with the enemies of the sovereign. In one such case Queen Mary sent over her letter under her privy seal, calling upon one Bartue to return to England; but Bartue's servants intercepted and maltreated the Queen's messenger so that he could not serve the letter. Upon a return to

¹ 6 Selden Soc. Pub., lxviii.

² 10 Selden Soc. Pub., 61.

³ *Ibid.*, 68.

⁴ *Ibid.*, 55.

⁵ 16 Selden Soc. Pub., 112 (1500); *Ibid.*, 208 (1510).

this effect made in the chancery, Bartue was adjudged in contempt and his lands forfeited; and although when Elizabeth came to the throne his lands were restored, the court was inclined to hold that the punishment for contempt would still remain and must be separately pardoned.¹ A little later Elizabeth sent a similar letter to one of her Catholic subjects living abroad, calling upon him to return forthwith. On this occasion the letter was duly served by the messenger and a return made in chancery, and on the failure of the subject to return, he was adjudged in contempt and his lands sequestered.²

Contempt of this last sort — that is, mere disobedience of the king's seal — became of increasing importance from the time the lord chancellor adopted it as the basis of his judicial power. The chancellor had no direct power over property or persons, and no control over any executive officer, sheriff, constable, or bailiff. The decree of his court derived its force from the fact that it was granted by the keeper of the king's seal, and was executed by means of a writ sealed with that seal. The force of this writ did not depend on its being formally served by an officer having power to serve civil process. Any messenger could convey the writ to the person addressed, and a mere knowledge of the king's will by such person compelled him, on his allegiance, to obey without formal service. Disobedience to the order of the court which did not constitute active contempt of court could not be punished, since the order of the court, as such, had no legal force; but disobedience to the king's seal was, as has been seen, a contempt of the king. Thus through the use of the great seal the chancellor got power over defendants in his court.³

Langdell describes this process with his usual clearness and accuracy. "The chancellor has never had a seal of his own, and he cannot even compel a witness to appear and testify, except by a writ under the great seal. The chancellor also has to enforce his authority by writ in cases where, upon ordinary principles, a writ is neither necessary nor proper. Thus, all the decisions of the chancellor upon questions brought before him are embodied in orders or decrees, which are formally drawn up in writing, and which, as will be seen presently, always direct the

¹ Bartue's Case, Dyer 176 b.

² Knowles v. Luce, Moore 109.

³ "The offense committed is the not paying obedience to the great seal. . . . The mere service of a copy of the decree or order, without such a writ, will not be sufficient." 2 Dan. Ch. Pr., 1 ed., 702.

party against whom they are made to do something. The normal mode of enforcing such orders and decrees would be to serve them upon the parties respectively by whom they were to be performed (generally by showing the original and delivering a copy), and, if they refused obedience, to punish them for contempt of the authority of the court. But in chancery the mode is to issue a writ under the great seal, incorporating in it the tenor of the substance of the order or decree, and commanding the party to perform it; and, if he refuses obedience to the writ, he is guilty of a contempt, not to the chancellor, but to the king."¹

But as this use of the king's seal became common and process sealed with that seal was issued as of course, disobedience to the seal inevitably and insensibly took on a less serious form. A king's seal which is at the service of a private party in a suit ceases to be a dread symbol of sovereign power and becomes merely part of the machinery of a court administering justice between party and party. So in the centuries between the Tudor and the Hanoverian, the process of contempt for the disobedience of an order in chancery ceased to have any higher significance than that of a step in civil process. While disobedience to process was still punishable as contempt of the king, it was, in fact, a mere method of executing the decree of the court in favor of a successful party to the suit; and it was inevitable that this fact should finally be recognized and given legal effect. The clear and express recognition of it, however, did not come until well on in the nineteenth century. A member of Parliament had been attached for contempt in clandestinely removing a ward of court from the custody of a person to whom she had been committed by the chancellor. He set up his privilege as a member of Parliament, which, it was admitted, was good against a civil process. It was clear that a member of Parliament could not be committed for certain kinds of contempt. Beames, for the defendant, urged that "the court makes no distinction between civil contempts, if I may so express myself, and criminal contempts. The court makes a considerable distinction between what are, in its own language, termed aggravated contempts and those not of an aggravated description." Lord Brougham, however, then Lord Chancellor, drew the distinction between the breach of an order of a personal description and actual interruption of the business of a court. Committal for breach

¹ Langdell, *Sum. Eq. Plead.*, § 38.

of a mere personal order, he said, was in the nature of process to compel performance, and was a civil contempt, to which it was admitted the privilege of Parliament would be a protection.¹ But a commitment for interruption of the court's business, as in the case at bar, was criminal in its nature, and the privilege of Parliament was no answer to it.²

This distinction is now well settled in England, where all the resultant differences as to privilege from arrest, the form of appeal, and the pardoning power of the sovereign are maintained between criminal and civil contempts.³ In this country the distinction has usually been accepted in the same form and with the same results as in the English cases.⁴ The Supreme Court of the United States in *New Orleans v. Steamship Co.*⁵ held that disobedience to process of equity in a civil suit was contempt of a criminal nature, distinct from the civil suit in the course of which the attachment for contempt was issued; and because the attachment was of a criminal nature it could not be brought up to the Supreme Court on error, but only, as the court intimated, on a certificate of difference of opinion between the judges. If the reason given was necessary to the decision, there is no doubt that this case is an authority which is opposed to the general current of decisions.⁶ There is no doubt that an ordinary proceeding for real criminal contempt can be brought up to the Supreme Court in the form of an appeal upon certificate of division by the judges, though the ordinary method to raise in the Supreme Court the question of the legality of the commitment is by a writ of *habeas corpus*.⁷ But it would seem in case of commitment for contempt in the course of civil proceedings where no separate process is issued, but the party offending is dealt with

¹ *Catmur v. Knatchbull*, 7 T. R. 448 (1797).

² *Wellesley's Case*, 2 Russ. & M. 639 (1831).

³ *In re Freston*, 11 Q. B. D. 545; *Harvey v. Harvey*, 26 Ch. D. 644; *Regina v. Barnardo*, 23 Q. B. D. 305; *O'Shea v. O'Shea*, 15 P. D. 59; *In re Special Reference*, [1893] A. C. 138.

⁴ *Naturita C. R. Co. v. People*, 30 Colo. 407; *Leopold v. People*, 140 Ill. 552; *Swedish Am. Tel. Co. v. Casualty Co.*, 208 Ill. 562; *Beck v. State*, 72 Ind. 250; *Arnold v. Com.*, 80 Ky. 300; *State v. Becht*, 23 Minn. 411; *Thompson v. R. R.*, 48 N. J. Eq. 105; *People v. Court of Oyer & Terminer*, 101 N. Y. 245; *State v. Knight*, 3 S. D. 509.

⁵ 20 Wall. (U. S.) 387.

⁶ The same view is held in a few states. *Ex parte Gould*, 99 Cal. 355; *Haight v. Lucia*, 36 Wis. 360.

⁷ *Ex parte Terry*, 128 U. S. 289.

upon motion for a mere breach of an order of the court pending the progress of the suit, that the question cannot be taken directly up to the higher court, either by appeal or by writ of error. In such a case, if there is no ground for *habeas corpus*, the determination of the question of contempt by the higher court must await the final disposition of the principal suit. For that reason it would seem that the decision of the Supreme Court in the New Orleans case can be supported without deciding the question of whether the contempt was criminal or civil. There is no doubt that the decision was followed on the exact ground that the proceeding was a criminal one in several of the federal courts,¹ but the Supreme Court recognized the established distinction later in the Debs case,² where Mr. Justice Brewer said: "A court enforcing obedience to its orders by proceedings for contempt is not executing the criminal laws of the land, but only securing the suitors the rights which it had adjudged them entitled to." The federal courts now appear firmly to hold the doctrine of the English cases,³ which may now safely be asserted as the recognized doctrine both in England and in this country.

This difference in nature between the contempt of the king's seal on a writ and active contempt of the court appears also in the method by which the court deals with the contempt. Active contempt of the court, like similar contempt of the king, is a crime, and indeed may be indicted and punished as a misdemeanor. It is usually dealt with summarily by the court, which causes the immediate arrest of the offender and sentences him to a fine or imprisonment as a punishment for his wrongdoing. Quite otherwise is the action of the court where its injunction or other order or decree is violated by the person to whom it is addressed. In such case the violation is called to the attention of the court by the injured party, and if the violation is proved the wrongdoer is committed to prison to remain until he purges himself of his contempt by doing the right or undoing the wrong. As early as the time of Richard III it was said that the chancellor of England compels a party against whom an order is issued by imprisonment;⁴ and a little later it was said in the chancery that "a decree does not bind the right, but only binds the person to obedience, so that if the party will not obey, then the chancellor may commit him

¹ *Fischer v. Hayes*, 6 Fed. 63; *In re Mullen*, 7 Blatchf. (U. S.) 23.

² *In re Debs*, 158 U. S. 564.

³ *In re Nevitt*, 117 Fed. 448.

⁴ 2 R. III, 9, pl. 22.

to prison till he obey, and that is all the chancellor can do."¹ This imprisonment was by no means a punishment, but was merely to secure obedience to the writ of the king. Down to within a century it was very doubtful if the chancellor could under any circumstances inflict punishment for disobedience of a decree. If the decree commanded the defendant to transfer property, the chancellor acquired power as early as the sixteenth century to sequester the property as security for performance; but if the decree were for the doing of any other act, or were a decree for an injunction, the chancellor was helpless if he could not compel obedience by imprisonment. There were, to be sure, one or two instances where an impetuous chancellor appears to have used stronger methods of persuasion than were properly within his right. Thus Daniell, following earlier writers, mentions with bated breath an occasion where a contumacious defendant was loaded with chains, another where his wife and children were refused permission to see him, and even a third where the chancellor imposed a fine.² But it is obvious that even so late as 1830 this was regarded as an improper method of enforcing obedience. In any case the contempt of a defendant who had violated a decree in chancery could be purged by doing the act commanded and paying costs; or, if his disobedience had been the violation of a negative injunction, he could purge himself of contempt by undoing what he had done and paying costs. In any case a waiver of the terms of the decree by the other party to the suit put an end to the imprisonment for contempt.³

It thus appears that imprisonment for contempt of the chancellor's decree, or rather for contempt of the king's writ issued in execution of such decree, was not punitive but coercive; and that anything in the nature of a sentence to a definite punishment, like a fine or an imprisonment for a term, was entirely foreign to the process. It sometimes happened, however, that a person violated a decree in such a way that it was impossible for him to restore the *status quo ante*. In such a case if the other party to the suit were obdurate he might remain in prison during the rest of his life, through his inability to purge himself of his contempt. This was obviously a hardship and an injustice, and a limited term of imprisonment came to be looked upon as a requirement of humanity. It was probably for this reason that in

¹ 27 H. VIII, 15.

² 2 Dan., Ch. Pr., 1 ed., 721.

³ 1 *ibid.*, 660, 663; 2 *ibid.*, 726.

recent times a sort of punishment by limited term of imprisonment or even by fine, payable to the injured party, has been substituted for the old coercive imprisonment in case of civil contempt.

It should be noticed, in passing, that an act which is a violation of an injunction may at the same time possess all the features of an active contempt of court. In a case, for instance, like that of *Debs*,¹ where the defendant, in violation of an injunction against stopping mail-trains, collected a great assembly of men and riotously interfered with the running of the trains, the act, it would seem, was not merely a violation of the injunction, but was an active contempt of the court which issued it and of the sovereign whose mails were thus obstructed. In such a case the requirements of the private suit would be met by simple restraint of the person until the danger of violation of the injunction had passed, or until security was given that the injunction would not be violated; but in addition a punitive sentence is called for on account of the contemptuous nature of the act of violation.

This discussion of the nature of contempts and of the proper punishment for them throws light on one of the most vexed questions of procedure that have lately been agitated. It has been urged with great earnestness and force that no one should be punished for a contempt of court except after a trial by jury and a verdict of guilty. It is urged that the whole genius of our law requires a verdict of a jury before punishment for a crime, and that it is contrary to all our charters of liberty, from *Magna Carta* to the Constitution of the United States, to permit a man to be charged with crime, convicted of it, and punished for it by the mere will of a judge who fancies himself offended. It is especially urged in the case of labor troubles that it is an enormous and dangerous power to put in the hands of an equity judge. When a single judge sitting without a jury can issue an injunction against a strike, can pass upon a charge that the injunction has been violated, and can imprison at his own will the person found guilty of it without any opportunity for pardon by the executive (since the proceeding is one for civil contempt), too much power, it is contended, over the lives and liberties of freemen is placed in the hands of a single irresponsible magistrate.

With reference to the question of what is the proper process in punishments for contempt, it will be seen that there is a sharp dif-

¹ *In re Debs, supra.*

ference between acts done in the face of the court itself and acts done outside court which will, nevertheless, interfere with the course of justice. The necessity for a summary and exemplary punishment is far greater in the case of a direct contempt in face of the court than in the case of a contempt outside court. A danger always exists in the punishment of any contempt by summary process by the judge who has suffered from the contempt; he is made both judge and jury in his own case, he passes on the facts and on the law, and determines the punishment. Such a power in the hands of an angry man is, of course, subject to abuse; and judges, being human, are subject to anger like other men. But if contempt is to be punished *instantly*, it must be done in most cases by the judge himself who is the subject of the contempt, and he must act in many cases under the influence of a strong feeling of insult. In the case of contempt offered directly in the face of the court there seems to be no other course to adopt than the immediate punishment of the offender. The danger of harshness on the part of the judge is a less evil than the danger of a complete suppression of the functions of justice by permitting an uproar to continue unchecked. The least thing that can be done is to imprison the offender as a preventive measure. There is no doubt that the judge has power to act immediately, without attachment or other process, upon his own knowledge, and to condemn and punish without receiving further evidence than that of his own senses. In the ordinary case there is equally no doubt that the better course is to order the offender imprisoned instantly, but to permit him later to purge himself of the contempt.

When the act of contempt does not occur in the face of the court but by some act done out of court and interfering with the course of justice, a more regular procedure is required. An attachment issues on affidavits, the offender is brought before the court and has an opportunity to disprove the facts charged against him. This very circumstance, that the forms of contentious procedure are complied with, prevents the infliction and punishment in such a summary form as that employed for a direct contempt in the face of the court. Summary punishment is less necessary in such cases. A delay of a day or two, especially after service of the attachment, will not necessarily prejudice the court. Under these circumstances it will ordinarily be possible, except in the case of a court where there is only a single judge, to secure a trial before some other judge than the one directly attacked or the one especially

interested in the trial. So in the Tichborne case¹ the chief justice, who was an especial object of attack by the claimant's friends, did not sit in the proceedings for contempt, and the opinion was delivered by Mr. Justice Blackburn, who, it was known, was not to sit at the trial. But the fact that a short delay is possible gives an opportunity in such proceedings to summon a jury and have the question of fact passed upon by it. Many states by statute now require this form of process, and there can be no reasonable objection to it. The argument often offered in favor of such a course, to be sure, is not sound; namely, that otherwise the person attached would be convicted of a crime without a trial by jury. The process is, it is true, in the large sense, a criminal one; but the attachment for contempt is, nevertheless, not a proceeding against a man for a technical crime. The person attached and punished for contempt may independently and thereafter be indicted and punished for the crime he has committed. And yet, though technically there is no constitutional objection to the trial of such a contempt without a jury, and indeed it does not differ in kind from the contempt committed in face of the court where a jury trial is out of the question, the same general considerations of justice which lead to a jury trial upon a charge of crime also lead to the conclusion that a jury trial in such a case, where it is practicable, is required.

In the case of contempt in violating an order or decree of a court of equity, we have an entirely different problem. So far as the ancient process has not been modified by modern innovations, we have seen that it was purely coercive, not punitive. Where this is still the case, it seems clear that a trial by jury is not required by the general principles of the law or by general considerations of justice; nor, as a matter of fact, would it be generally practicable. If the court limits itself to its proper action in such cases, namely, process of imprisonment merely to prevent the violation of the decree, and if the imprisonment is to cease as soon as the danger of disobedience has ceased, the jury, which is thought necessary to pass upon the desert of a defendant to suffer punishment, is not required. Nor is there any reason why the judge who is dealing with the subject-matter of the suit should not also deal with this process for enforcing obedience to his decree. No question of passion or prejudice is involved; but, on the other hand, a

¹ *Supra.*

knowledge of the issues of the case is essential to a proper dealing with the problem. This knowledge is already in the possession of the judge who is trying the principal case. So far, therefore, as popular clamor demands a trial by jury in such a case, it seems to go beyond the requirements of justice; and the statutes which commit the trial of questions of fact in such process to a jury are not likely permanently to prove satisfactory. This statement, however, is to be limited to cases of merely preventive imprisonment. Where the court inflicts a definite term of imprisonment by way of punishment for the violation of its orders, the case does not differ, it would seem, from the case of criminal contempt out of court, and regular process and trial by jury should be required.

Joseph H. Beale, Jr.

REASONABLENESS OF MAXIMUM RATES AS A CONSTITUTIONAL LIMITATION UPON RATE REGULATION.

THOMAS JEFFERSON, urging the necessity of a Bill of Rights in the Constitution of the United States, wrote to James Madison from Paris, March 15, 1789, as follows: "This instrument forms us into one state, as to certain objects, and gives us a legislative and executive body for these objects. It should, therefore, guard us against their abuses of power within the field submitted to them . . . The tyranny of the legislature is the most formidable dread at present and will be for many years. That of the executive, will come in its turn; but it will be at a remote period."¹ Freedom was the dominant issue of the times — not only political, but civil and religious freedom — and it is not surprising that the wisdom and foresight of the framers of the Constitution embodied in the Fifth Amendment the provision concerning personal rights and private property:

"nor shall any person . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Eighty years later, in substantially the same form, there was adopted in the Fourteenth Amendment the following clause:

"nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

That the fundamental principles of personal liberty and private property as declared by the Magna Carta, the Petition of Rights, and the Bill of Rights were a part of the common law at the time the delegates assembled to prepare the Constitution of the United States in 1787, was denied by none. But, strange to say, Hamilton is found in opposition to the inclusion of a Bill of Rights in the Constitution of the United States, although he admitted that it

¹ 3 Jefferson's Works, 4, 5, 201. See also 2 *ibid.*, 329.

constituted a part of the Constitution of England.¹ His assigned reason was that a government emanating from the people and not from a hereditary sovereign could do no wrong. The rights of personal liberty and of private property, to the mind of Hamilton, existed merely as legislative enactments of prevailing public opinion; that the purpose of a constitution was merely "to regulate the general political interests of the nation," and that it had no concern with personal and private rights, a declaration of which "would sound much better in a treatise of ethics than in a constitution of government."² It is fortunate for this country that the views of Hamilton, although prevailing in the Constitution itself, were later repudiated, and that a Bill of Rights was adopted in 1789-91 in the form of the first ten Amendments; for it is now well recognized that a legislative majority cannot be trusted to deal fairly with the liberty and property of the individual. The foregoing provision of the Fourteenth Amendment was merely an application to the states of the similar provision in the Fifth Amendment limiting the power of the federal government. It restricts the police power of the states and confers upon the federal judiciary authority to determine whether the fundamental and inalienable rights of a person to his life, liberty, and property have been infringed. Consequently, since its adoption all questions pertaining to the deprivation of life, liberty, and property without due process of law must receive their ultimate and final determination in the Supreme Court of the United States. Shall the "due process of law" clause be given the meaning and intent with which it spoke when adopted, or shall it serve merely as a mirror to reflect the popular opinions and passions of the day? If these great and fundamental guaranties of life, liberty, and property have a historical meaning and force, that fact should be so declared and should operate as a constitutional barrier against the unrestrained enactment of dominant opinion into law.³

There is no dispute that the right of the individual to the enjoy-

¹ *Slaughter-House Cases*, 16 Wall. (U. S.) 36, 114.

² *The Federalist*, Number 84.

³ Mr. Justice Brewer in *South Carolina v. United States*, 199 U. S. 437, 448, said: "The Constitution is a written instrument. As such, its meaning does not alter. That which it meant when adopted, it means now . . . In other words, while the powers granted do not change, they apply from generation to generation to all things to which they are, in their nature, applicable. This in no manner abridges the fact of its changeless nature and meaning. Those things which are within its grants of power, as those grants were understood when made, are still within them, and those things not within them remain still excluded."

ment of his property is subject to the legitimate exercise of the police power. But when the exercise of this power interferes with the property rights of an individual, it raises a judicial question as to whether it is more vital to the welfare of the community that the individual be allowed to use and enjoy his property without the particular legislation complained of, or whether the legislative restraint should prevail. If the legislation tends to promote the health,¹ the safety,² the morals,³ or the order and peace of the community,⁴ the general public convenience,⁵ or tends to promote the general welfare and prosperity of the community,⁶ the only proper judicial inquiry is whether or not such legislation has a real and substantial relation to the ends sought to be accomplished.⁷ If it has, the rights of the individual must yield to the general welfare of the community.

In respect to that indefinite field of the police power which lies outside of the aforesaid purposes, restrictive legislation is less essential to the public welfare, and not only disturbs economic conditions, but must result in either favoritism or oppression. This field covers what might be termed the economic interests of the community. The justification of such legislation is the possibility of oppression or undue advantage which the accumulation of capi-

¹ *Holden v. Hardy*, 169 U. S. 366 (hours of labor in mines and smelters); *Jacobson v. Massachusetts*, 197 U. S. 11 (compulsory vaccination); *Mugler v. Kansas*, 123 U. S. 623 (prohibition of manufacture and sale of liquors); *People v. Van De Carr*, 199 U. S. 552 (sale of milk); *California Reduction v. Sanitary Reduction*, 199 U. S. 306; *Gardner v. Michigan*, 199 U. S. 325 (disposal of garbage).

² *N. Y. & N. E. R. R. v. Bristol*, 151 U. S. 556, 571; *C., B. & Q. R. R. v. Chicago*, 166 U. S. 226, 255 (eliminating grade crossings); *Barbier v. Connolly*, 113 U. S. 27 (closing of laundries from 10 P. M. to 6 A. M.).

³ *Douglas v. Kentucky*, 168 U. S. 488 (lotteries); *Otis v. Parker*, 187 U. S. 606 (stock transactions on margin).

⁴ *Mugler v. Kansas*, *supra*; *Hennington v. Georgia*, 163 U. S. 299 (running of freight trains on Sunday).

⁵ *L. S. & M. S. Ry. Co. v. Ohio*, 173 U. S. 285 (requiring railroads to stop trains at regular stations); *Atlantic Coast Line v. Commission*, 206 U. S. 1 (requiring railroads to operate certain trains); *Wisconsin, etc., Ry. v. Jacobson*, 179 U. S. 287 (enforcing track connections between two railroads); *Escanaba Co. v. Chicago*, 107 U. S. 678 (opening and closing of bridges over navigable streams).

⁶ *Scranton v. Wheeler*, 179 U. S. 141 (changing the level of navigable waters); *Transportation Co. v. Chicago*, 99 U. S. 635 (changing grade of a public highway by carrying it in a tunnel under navigable waters); *West Chicago St. R. R. v. Chicago*, 201 U. S. 506 (requiring the removal of a street railroad tunnel which obstructs navigable waters); *C., B. & Q. Ry. v. Drainage Commissioners*, 200 U. S. 561, 592 (reclamation of swamp lands); *Bacon v. Walker*, 204 U. S. 311 (pasturage of sheep on public domain within two miles of a dwelling-house).

⁷ *Mugler v. Kansas*, *supra*, 661 *et seq.*

tal or labor has power to create.¹ From time immemorial monopolies and combinations in restraint of trade have been subject to legislative control.² Aside from anti-trust legislation, the most important exercise of the police power in respect to economic interests is the regulation of rates of charge. Under this head come usury laws, inn-keepers' charges, regulation of charges for elevating and storing grain,³ for the care of live-stock in stock-yards,⁴ for transportation on railroads,⁵ for telephone service,⁶ and charges for the supply of water⁷ and gas.⁸

Fundamentally the purpose of restricting or prohibiting monopolies is not different from that of regulating rates of charge. The anti-trust laws tend to create competitive conditions and the adjustment thereby of the rates of charge at the real value of the service rendered.⁹ Legislation regulating rates of charge substitutes, in place of competition, the fiat of the legislature. The purpose of both is the same, the prevention of economic oppression — yet a striking difference exists between these two forms of legislation with respect to the conditions resulting from them. Anti-trust laws, in preventing or restricting the great combinations of wealth, foster and promote competition and freedom of contract. On the other hand, rate regulation leaves monopolistic combinations as it finds them, and interferes directly with the management of business and the right to make contracts. It is thus much more radical legislation, and in reality a form of paternalism. However, both anti-trust legislation and rate regulation pertain to the purely economic interests of the community, and present an entirely different question from that arising under the exercise of the police power for the other enumerated purposes, in that the right of the state to interfere is based solely upon the ground that the pur-

¹ *Munn v. Illinois*, 94 U. S. 113, 131, 132. See Beale, R. R. Rate Regulation, §§ 55, 66.

² *Slaughter-House Cases*, 16 Wall. (U. S.) 36, 104, 105; *United States v. Joint Traffic Ass'n*, 171 U. S. 505, 569; *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290; *Northern Securities Co. v. United States*, 193 U. S. 197, 337, 339. See also *Freund, Police Power*, §§ 330, 338 *et seq.*

³ *Munn v. Illinois*, 94 U. S. 113; *Budd v. New York*, 143 U. S. 517; *Brass v. North Dakota*, 153 U. S. 391.

⁴ *Cotting v. Kansas City Stockyards*, 183 U. S. 79.

⁵ *C., B. & Q. Ry. v. Iowa*, 94 U. S. 155; *Railroad Commission Cases*, 116 U. S. 307.

⁶ *Hockett v. State*, 105 Ind. 250.

⁷ *Spring Valley Water Works v. Schottler*, 110 U. S. 347.

⁸ *State v. Columbus Gas Light & Coke Co.*, 34 Oh. St. 572.

⁹ *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 339.

chaser is at an economic disadvantage and is unable to buy at a fair and reasonable price. Where the court is confronted with a question involving merely the accumulation of capital or labor and the concomitant disadvantage of the consumer, it is necessary for it to consider a question of economics. It may either start from the point of view of paternalism, that the legislature should have the widest possible discretion in the determination of what is to the best interests of the individual, or it may start from the point of view of individualism, that the welfare of the country is better served by permitting the freest possible individual liberty in respect to the use and enjoyment of property consistent with the public good. It is not incumbent upon the court to accept either socialism or the doctrine of *laissez faire*. But how can it reach a conclusion as to the limitations of legislative power upon a purely economic question, unless it adopts some theory of economics?

Governmental regulation, as such, is a conceded legislative power. The determination of the limits of this power, however, involves a question of constitutional interpretation. A constitution not only defines the powers and duties of the government, but also the rights and duties of the governed, and is, therefore, the embodiment of the "organic relation of the citizen to the state." Although it may be conceded that the provisions of the Fourteenth Amendment do not enact Mr. Herbert Spencer's Social Statics,¹ yet these guaranties must be interpreted in the light of some theory of government. The refusal of the judiciary to determine the limits of the police power would be an evasion of its duty to declare that "this Constitution . . . shall be the supreme law of the land"² and would result in denying to the individual those fundamental rights of personal liberty and private property which are the heritage of the English-speaking race. The majority of the court in *Lochner v. New York*³ maintained that the court *must* ascertain the proper limits of the police power in every case which comes before it, and that if it permitted legislation to stand whenever there might exist a difference of opinion as to its constitutionality "the claim of the police power would be a mere pretext — become another and delusive name for the supreme sovereignty of the state to be exercised free from constitutional restraint."⁴ Underlying this decision and forming the basis thereof is the doctrine of individualism as con-

¹ Mr. Justice Holmes' dissenting opinion, *Lochner v. New York*, 198 U. S. 45, 75

² Constitution, Article VI.

³ 198 U. S. 45.

⁴ P. 56, Mr. Justice Peckham.

trasted with paternalism. "Due process of law" is construed to guarantee the greatest possible individual freedom consistent with the public welfare. The court will scrutinize carefully the ground or reason upon which the legislation is justified, for the purpose of determining whether or not it constitutes a material danger to the public welfare. The position of Mr. Justice Holmes would be destructive of all constitutional interpretation in cases of this kind, and would constitute the legislature the supreme judge upon all questions of the right to contract and to enjoy and dispose of property. The position of Mr. Justice Harlan is equally inadmissible,¹ in that it opens wide the door "for the play and action of purely personal and arbitrary power."² It admits that the limitation of the police power is a judicial question, yet refuses to establish any basis or test for its determination. Any other position than that taken by the majority would not only amount to a failure to discharge the duty imposed upon the judiciary by the Constitution, but would permit an encroachment by the legislature upon the property rights of the individual, which by gradual process might change over society from an individualistic to a socialistic basis. As the Constitution has endeavored to insure to the individual the greatest possible personal liberty consistent with public welfare, it would seem that the greatest possible protection of his property is both the limitation and the duty of government.³ The spirit of our institutions is essentially individualistic, and this fact must have a controlling influence in the interpretation of the Constitution upon purely economic questions.

This doctrine or policy of government applies directly to rate regulation. No disadvantage of the consumer in dealing with the producer requires that the producer be divested of the management of his business. The state has no general and unlimited right to interfere between the producer and the consumer as to the price at which the public shall be served. The only justification of the exercise of police power in this instance is to prevent exorbitant and oppressive rates of charge, and that object is accomplished when the regulation assures to the public reasonable and fair rates. Rate regulation, therefore, must be limited to the establishment of maximum rates, "beyond which the company cannot go, but within which it is at liberty to conduct its work in such a manner as

¹ P. 72.

² *Yick Wo v. Hopkins*, 118 U. S. 356, 370.

³ *Budd v. New York*, 143 U. S. 517, 551. Dissenting opinion, Mr. Justice Brewer.

may seem to it best suited for its prosperity and success."¹ The power of the legislature to regulate is exhausted when it has fixed a maximum rate. Legislation restricting the management of the business by fixing absolute, minimum, commutation, or other arbitrary rates, is unconstitutional and void.²

In the absence of legislative regulation upon the subject the proper rate or charge is primarily a judicial question. The company or person rendering the service is entitled to receive reasonable compensation. This rule prevailed at common law.³ Statutory regulation was not intended to change this rule, but to substitute a primary legislative determination in place of a judicial determination as to what constitutes a reasonable maximum rate. This was conceded unreservedly, even in *Munn v. Illinois*.⁴ Only the right to regulate, as such, was involved in that case, and the dictum therein contained that this power is unlimited, was later repudiated.⁵ In 1890 the reasonableness of a legislative rate was held to be a judicial question.⁶ Shortly afterwards it was conceded that the power of the legislature is merely to protect the public against unreasonable rates.⁷

Although the rule laid down in *Smyth v. Ames*⁸ is now well

¹ *Lake Shore, etc., Ry. Co. v. Smith*, 173 U. S. 684, 691.

² *Ibid.*

³ *Interstate Com. Com. v. Baltimore & Ohio*, 145 U. S. 263, 275.

⁴ 94 U. S. 113, 134. Chief Justice Waite said in his opinion: "So, too, in matters which do affect the public interest, and as to which legislative control may be exercised, if there are no statutory regulations upon the subject, the courts must determine what is reasonable. The controlling fact is the power to regulate at all. If that exists, the right to establish the maximum of charge, as one of the means of regulation, is implied. In fact, the common law rule, which requires the charge to be reasonable, is itself a regulation as to price. Without it the owner could make his rates at will, and compel the public to yield to his terms, or forego the use.

"But a mere common law regulation of trade or business may be changed by statute. . . . Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances. To limit the rate or charge for services rendered in a public employment, or for the use of property in which the public has an interest, is only changing a regulation which existed before. It establishes no new principle in the law, but only gives a new effect to an old one." See also language of Mr. Justice Brewer in *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 397.

⁵ *Railroad Commission Cases*, 116 U. S. 307, 331 (1886).

⁶ *Chicago, etc., R. R. v. Minnesota*, 134 U. S. 418, 458.

⁷ *Railway v. Wellman*, 143 U. S. 339, 343. "The legislature has power to fix rates and the extent of judicial interference is protection against unreasonable rates." *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 397, 399. *Covington, etc., Turnpike Co. v. Sandford*, 164 U. S. 578, 596.

⁸ 169 U. S. 466, 545, 547. Mr. Justice Harlan said in his opinion: ". . . the gov

established, that a "state enactment . . . that will not admit of the carrier earning such compensation as under all the circumstances is just to it and to the public" is unconstitutional and void, the principles by which the question of reasonableness must be determined are only negatively disclosed by the subsequent decisions of the Supreme Court. In many cases the proof has been held inadequate,¹ and in others the reasonableness or unreasonableness of the rates was so clear that the discussion of the fundamental rule was unnecessary.² The difficulty lies in framing a standard of reasonableness. With respect to an entire schedule, the test which has been most generally applied is that the schedule should afford the capital invested a return equal to that received by capital invested in similar enterprises. In respect to individual rates the Supreme Court of the United States has not yet definitely settled either that the reasonableness of the same may be judicially raised or what test is to be applied for the determination thereof. Individual rates, however, must fall within certain limits. The charge cannot exceed the value added by the service, nor can the charge be less than the cost of rendering the service. What would be a reasonable rate within these limitations has not been decided. Theoretically the individual rate should bear its proportionate share of the total expenditures of the company, but practically this rule is extremely difficult of application.³

ernment may, by legislation, protect the people against unreasonable charges for the services rendered by it [the company]." "On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it [the company] are reasonably worth."

¹ *Dow v. Beidelman*, 125 U. S. 680; *Chicago, M. & St. P. Ry. Co. v. Tompkins*, 176 U. S. 167; *San Diego, etc., Co. v. National City*, 174 U. S. 739; *Minneapolis & St. Louis R. R. v. Minnesota*, 186 U. S. 257; *Atlantic Coast Line v. Florida*, 203 U. S. 256.

² *Stanislaus County v. San Joaquin*, 192 U. S. 201 (reasonable).

³ *Noyes, American Railroad Rates*, 28 *et seq.* *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 331, by Mr. Justice Peckham: "What is a proper standard by which to judge the fact of reasonable rates? Must the rate be so high as to enable the return for the whole business done to amount to a sum sufficient to afford the shareholder a fair and reasonable profit upon his investment? If so, what is a fair and reasonable profit? That depends sometimes upon the risk incurred, and the rate itself differs in different localities: which is the one to which reference is to be made as the standard? Or is the reasonableness of the profit to be limited to a fair return upon the capital that would have been sufficient to build and equip the road, if honestly expended? Or is still another standard to be created and the reasonableness of the charges tried by the cost of the carriage of the article, and a reasonable profit allowed on that? And in such case would contribution to a sinking fund to make repairs upon the road-bed and renewal of cars, etc., be assumed as a proper item? Or is the reasonableness of the charge to be tested by reference to the

The decisions are uniform that where the regulation consists of the establishment of a schedule of rates based upon the classification of rates charged by the railroad itself, and affecting either the entire business of the company or such a well-defined class of traffic as the passenger or freight business, the rule or test is that the constitutionality of the regulation will depend upon its effect upon the entire business of the company, or such freight or passenger traffic.¹ The unreasonableness of the rates was held to be established when it appeared that the net income of the company or person affected by the regulation would not be sufficient to discharge the necessary expenditures for operation. In *Smyth v. Ames*, however, the court went further, and held that the carrier, in addition to its proper expenditures, was entitled to receive for its services "just compensation." The method suggested by Mr. Justice Harlan was to ascertain the fair value of the property used for the public convenience, the gross earnings and expenses, and the probable net earnings under such regulation. A comparison of such net earnings with the valuation would determine whether or not the probable income would amount to "just compensation." In short, the test of "due process of law" is the confiscation of the entire property and is determined by an analysis of the entire business of the company. No attempt was there made in any way to challenge the reasonableness of any particular rate, nor was the classification made by the Board of Transportation subjected to criticism. The attention of the Supreme Court, therefore, was not directed to these questions, and nothing which the court may have said in that case or in its subsequent decisions² should be construed as an opinion that the test therein enunciated was of universal application.

charges for transportation of the same kind of property made by other roads similarly situated? If the latter, a combination among such roads as to rates would, of course, furnish no means of answering the question. It is quite apparent, therefore, that it is exceedingly difficult to formulate even the terms of the rule itself which should govern in the matter of determining what would be reasonable rates for transportation." See Freund, *Police Power*, § 550.

¹ *Reagan v. Farmers' Loan & Trust Co.*, *supra*, 399; *Smyth v. Ames*, *supra*. In these cases the tariff, as a whole, was challenged, and no complaint was made of the classification of the traffic adopted by the commission. In *St. Louis & San Francisco Ry. v. Gill*, 156 U. S. 649, it was held that proof limited to *one division of a railroad* was insufficient to show the unreasonableness of a passenger rate affecting the entire railroad.

² *San Diego, etc., Co. v. National City*, *supra*; *Stanislaus County v. San Joaquin*, *supra*.

Without in any way detracting from the rule laid down in *Smyth v. Ames*, it may be confidently asserted that underlying that case and all the decisions of the Supreme Court upon rate regulation the more fundamental principle and the basis of all calculations is that no one can constitutionally demand a service to be rendered at less than cost or the fair value of the service.¹ In 1900 Mr. Justice Brewer said:² "Few cases are more difficult or perplexing than those which involve an inquiry whether the rates prescribed by the state legislature for the carrying of passengers and freight are unreasonable. And yet this difficulty affords no excuse for a failure to examine and solve the questions involved." The problem was still unsolved in 1901 when the same learned justice, in commenting upon the former rulings of the Supreme Court, said: "There has been no further ruling than that the state may prescribe and enforce reasonable charges. What shall be the test of reasonableness in those charges is absolutely undisclosed."³

In 1902 a case came before the Supreme Court which might have definitely settled the proper test or rule if the proof offered by the complainant had been adequate and had shown the unreasonableness of the rates in question.⁴ This was an action in

¹ In *Smyth v. Ames*, *supra*, 544, Mr. Justice Harlan, speaking for the court, said: "But the rights of the public would be ignored if rates for transportation of persons or property on a railroad are exacted without reference to the fair value of the property used for the public or the fair value of the services rendered." See also *San Diego, etc., Co. v. National City*, 174 U. S. 739, 757.

In *Cotting v. Kansas City Stockyards Co.*, 183 U. S. 79, 91, 95, Mr. Justice Brewer, in speaking of the attitude of the court, said: "It has been declared that the present value of the property is the basis by which the test of reasonableness is to be determined, although the actual cost is to be considered, and that the value of the services rendered to each individual is also to be considered. . . ."

"Pursuing this thought, we add that the state's regulation of his charges is not to be measured by the aggregate of his profits determined by the volume of business, but by the question whether any particular charge to an individual dealing with him is, considering the service rendered, an unreasonable exaction. . . . The question is not, how much does he make out of the volume of business; but whether, in each particular transaction, the charge is an unreasonable exaction for the services rendered. He has a right to do business. He has a right to charge for each separate service that which is reasonable compensation therefor, and the legislature may not deny him such reasonable compensation and may not interfere simply because out of the multitude of his transactions the amount of his profits is large. Such was the rule of the common law even in respect to those engaged in a quasi-public service, independent of legislative action."

² *Chicago, M. & St. P. Ry. v. Tompkins*, 176 U. S. 167, 172.

³ *Cotting v. Kansas City Stockyards*, *supra*, 91.

⁴ *Minneapolis & St. Louis R. R. v. Minnesota*, 186 U. S. 257.

mandamus by the State Railroad & Warehouse Commission of Minnesota to compel the defendant railroads to adopt specific rates on hard coal in car-load lots from Duluth to various points southwest from Minneapolis. The defense undertook to show that because the average cost of carrying freight of all kinds per ton per mile during the preceding year was greater than the revenue derived per ton per mile for carrying coal at the rates prescribed by the commission, therefore such rates were unreasonable. The defendant further proved that if the rates fixed by the commission for coal in car-load lots were applied to all freight carried by the road it could not pay its operating expenses. No proof, however, was offered as to the cost of carrying hard coal in car-load lots on the entire railroad or between the points mentioned in the schedule. A careful analysis of the whole opinion will lead to the conclusion that had the company been able to segregate the cost of the transportation of hard coal from the cost of its remaining business, and had the coal so transported been a substantial portion of the company's traffic and the cost of such transportation been found to be greater than the compensation allowed by the commission, the court would have granted the relief sought. This conclusion is irresistible, for if the court believed that the aggregate method, as laid down in *Smyth v. Ames*, was applicable for the determination of the reasonableness of specific rates, this case could have been disposed of summarily. The net income for the year under consideration applicable to dividends was \$458,662.04,¹ yet the total amount received on the traffic affected by the rates in question was only \$3,874.50. A regulation compelling the railroad to carry this traffic for nothing would have reduced the revenue for that year only \$3,874.50, while if the rates fixed by the commission had been in effect for the same time the loss of revenue would have been only \$1,409.72.² The loss of \$1,409.72 would have been of no consequence whatsoever if the constitutionality of this regulation had been tested by the rule announced in *Smyth v. Ames*. The Supreme Court would certainly not have given the case the elaborate consideration it apparently received unless in its judgment either the value or the cost of rendering the service was the appropriate test to be applied. The true rule seems to be taking definite form in this case, to wit, that a regulation is unconstitu-

¹ *State v. Minneapolis & St. Louis R. R.*, 80 Minn. 191, 198.

² *Minneapolis & St. Louis R. R. v. Minnesota*, *supra*, 265.

tional and void, *if it compels a service to be rendered at less than cost, irrespective of its effect upon the entire business.*¹

In all cases, therefore, where the rule laid down in *Smyth v. Ames*, that the reasonableness of the rates must be tested upon an aggregate basis, has no tendency to show whether the rates are reasonable or unreasonable, that rule must be rejected. It must be remembered that in the railroad cases in which the rates were held unreasonable,² there existed a classification of traffic based upon the value, weight, and size of various kinds of freight, the distance transported, and many other factors, applicable to which a schedule of rates based upon these considerations had been voluntarily put in force by the carriers themselves. Inasmuch as the state regulation consisted of a horizontal reduction of these rates it is apparent that such regulation affected the earnings as a whole, similar in manner as it affected the earnings of any class of traffic. That is, the total receipts and expenditures of the railroad reflected the receipts and expenditures of any particular class of service. What, therefore, was true of the reasonableness of the schedule as a whole was true of the various classes of traffic. As the carrier did not challenge the propriety of any particular rate on any particular class of traffic, it was quite natural that the court should test the constitutionality of the legislation upon an aggregate basis. It does not, however, follow, because such aggregate method of proof was adopted in those cases, that if the complainant had expressly challenged the right of the state to establish certain classes of service, the question would not have been determined upon the basis of the value or the cost of such service.

For similar reasons the reasonableness of a regulation which fails to classify a business in which the costs of the various classes

¹ Beale, R. R. Rate Regulation, § 325; Noyes, *American Railroad Rates*, 250, 252. In *Atlantic Coast Line R. R. Co. v. Florida*, 203 U. S. 256, 260, Mr. Justice Brewer for the court said: "And here we face this situation: the order of the commission was not operative upon all local rates, but only *fixed the rate on a single article*; to wit, phosphate. There is no evidence of the amount of phosphates carried locally; neither is it shown how much a change in the rate of carrying them will affect the income, nor how much the rate fixed by the railroads for carrying phosphates has been changed by the order of the commission. . . . *But there is nothing from which we can determine the cost of such transportation.* We are aware of the difficulty which attends proof of the cost of transporting a single article, and in order to determine the reasonableness of a rate prescribed, it may sometimes be necessary to accept as a basis the average rate of all transportation per ton per mile." See *Seaboard Air Line v. Florida*, 203 U. S. 261; *Alabama, etc., Ry. v. Mississippi*, 203 U. S. 496.

² *Reagan v. Farmers' Loan & Trust Co.*, *supra*, *Smyth v. Ames*, *supra*.

of service are different, or which arbitrarily classifies such service without regard to the cost thereof, could not be tested by the rule laid down in *Smyth v. Ames*. Take, for example, the establishment of a single maximum rate of five cents per ton-mile for all railroad traffic, both freight and passenger, and suppose that at such rate the total number of ton-miles transported during the previous year would yield sufficient income to pay the operating expenses, fixed charges, and earn something on the stock. If the carrier were able to continue business on this basis, it might be said that five cents per ton-mile was a living rate, but does this method of proof show that five cents is a *proper maximum rate*, in view of the fact that the traffic of the railroad is so diversified that the various costs of service per ton-mile may vary from one to ten cents. It is, moreover, extremely unlikely that under the conditions suggested the railroad could secure the same amount of traffic after regulation as it had before. An arbitrary rate of five cents per ton-mile would prohibit the transportation of many commodities which could have been carried at a profit at a less rate. The amount of traffic carried would depend not only upon the law of supply and demand, but also upon the price which the public could afford to pay for the commodities transported. Even if the result of such regulation would be to give to the company a profit on its entire business, would not the application of the rule in *Smyth v. Ames* result in entirely losing sight of the fundamental purpose of rate regulation, the assurance to the public of reasonable rates of charge? Can it be said that every rate is a proper maximum rate which is the result of lumping the entire business and striking an average? Is the right to fix a maximum rate to be construed to mean an average rate? If so, the purpose of governmental regulation would be entirely changed, for theoretically the right of the state is merely to prevent extortion and oppression, while if such method were adopted many rates might be legally established at a price below the actual cost of service. No one would contend that it was necessary for the protection of the public, demanding a certain class of service, that the maximum rate be fixed below the cost of furnishing that service. The judiciary, in framing a test or method for determining the validity of such a legislation, should carry out the fundamental purpose of the police power; that is, if the power of the state is limited to fixing a reasonable maximum rate, the test or method of proof should not permit the state to further encroach upon the rights of private property. The rule in *Smyth v. Ames*

will be of no assistance in solving the constitutional question of the reasonableness of particular rates on a portion of the traffic, or of a single maximum rate or a complete schedule of rates based upon an arbitrary classification, for it is obvious that the application of such a test entirely loses sight of the fundamental purpose of rate regulation.¹

The ultimate position of the Supreme Court of the United States is unquestionably forecasted in the recent case of *Atlantic Coast Line R. R. Co. v. North Carolina Corporation Commission*.² Although the court enforced an order of the commission compelling the railroad to operate a train between certain points at an actual loss, yet it carefully distinguished an order in respect to a public convenience which did not *necessarily* entail a loss, and the regulation of rates which would inevitably have that result. And in disposing of that particular case, the court, by Mr. Justice White, said: ³

"Let it also be conceded that a like repugnancy to the Constitution of the United States would arise from an order made in the exercise of the power to fix a rate when the result of the enforcement of such order would be to compel a carrier to serve, for a wholly inadequate compensation, a class or classes selected for legislative favor, even if, considering rates as a whole, a reasonable return from the operation of its road might be received by the carrier. . . . It follows, therefore, that the mere incurring of a loss from the performance of such a duty does not in and of itself necessarily give rise to the conclusion of unreasonableness, as would be the case where the whole scheme of rates was unreasonable, under the doctrine of *Smyth v. Ames*, or under the concessions made in the two propositions we have stated."

The importance of this "concession," as bearing upon the fundamental rules of rate regulation cannot be overestimated, as the court is evidently of the opinion that the rule as laid down in *Smyth v. Ames* is not controlling in all cases, and should not be applied if it has no tendency to demonstrate the unreasonableness of the rate. Great emphasis was placed upon the importance of a just classification of the service and the allowance of remunerative rates for furnishing each class of such service; *i. e.* constitu-

¹ The reasonableness of individual rates may be tested without making an elaborate analysis of costs by merely showing the customary or current rates for similar service under similar conditions. *Cotting v. Kansas City Stockyards*, *supra*, 97, 98; *Canada Southern Ry. v. Internat'l Bridge*, 8 App. Cas. 723.

² 206 U. S. 1.

³ P. 26.

tional protection should not be limited to the entire business of a public service company, but should be applied and enforced whenever the legislation compels the company to serve a distinct class of service at a loss, "to the detriment of other class or classes upon whom the burden of such loss would fall."

The following analysis covers the field of rate regulation in respect both to its extent and to the uniformity or diversification of the cost of service:

1. A schedule of maximum rates for the entire business.
2. A single maximum rate for the entire business.
3. A single maximum rate for a portion of the business.

The cost per unit of rendering public service may be either uniform or diversified, owing to varying conditions.

The various combinations under the above classification will be considered separately.

First: Where a schedule of maximum rates applies to the entire business of a company, the proper test is that employed in *Smyth v. Ames*; *i. e.*, if such schedule is based upon the classification adopted by the railroad and consists of a horizontal reduction. If, however, the state does not base its regulation upon existing classifications and rates of the company, the situation presented is that considered under the fourth heading.

Second: Where a single maximum rate applies to a service of which the cost per unit is uniform, the aggregate net earnings of the company reflect the measure of profit for the unit, and the reasonableness of the rate as a maximum.¹

Third: Where a single maximum rate is made applicable to a certain class of service, the test of the reasonableness of such rate is the value or cost of furnishing such service.²

Fourth: Where a single maximum rate is made applicable to the entire business and the cost of service per unit is variable, the legislation cannot constitutionally ignore this variable quantity which requires a classification of the service and the proper adjustment of rates thereto. In the absence of such a classification and adjustment the propriety of the single maximum rate must be tested with respect to the cost of rendering each separate and distinct class of service which the public may demand under such

¹ Such, for instance, was the test in *San Diego, etc., Co. v. National City, supra*; *San Diego, etc., Co. v. Jasper*, 189 U. S. 439; *Stanislaus County v. San Joaquin, supra*.

² This appears to be the principle laid down in *Minneapolis & St. Louis R. R. v. Minnesota, supra*.

regulation. This precise situation was presented in the case of *The Columbus Railway & Light Co. v. City of Columbus*.¹ A single maximum rate of five cents per kilowatt hour was there made applicable to a service which varied in cost from twelve cents per unit to about three cents per unit. The ordinance was held unconstitutional, regardless of the fact that upon the entire business of the company there would be a reasonable return, for the reason that "a single maximum rate requiring that a substantial definitely ascertainable portion of the service be rendered at less than cost, is a violation of the Fourteenth Amendment, and constitutes a taking of property without due process of law." Where there is no existing classification of rates established by the company, which might operate as an estoppel *in pais*, the same rule applies to a schedule of maximum rates in which the legislation improperly classifies the service and improperly adjusts the rates thereto.²

These conclusions are sustained by other considerations growing out of the fundamental obligations of public service. In addition to the duty of rendering service at reasonable prices, a public service company must do so without unjust discrimination, and furthermore, such a company must continue to render service to the public whether it desires to do so or not.³ If such company could refuse to render any unremunerative service, or any service at all, as in case of a lender of money under the usury laws, the situation would be very different. The right, therefore, of every member of the public to demand service makes it imperative that the question of the value or cost of that service be taken into consideration in the establishment of either a schedule of rates or of particular rates on a portion of the entire business. The interests

¹ Decided August 1, 1906, by the Circuit Court of the United States for the Southern District of Ohio.

² *Atlantic Coast Line v. North Carolina*, *supra*, 25, 26.

"Let it be conceded that if a scheme of maximum rates was imposed by state authority, as a whole adequately remunerative, and yet that some of such rates were so unequal as to exceed the flexible limit of judgment which belongs to the power to fix rates, that is, transcended the limits of just classification and amounted to the creation of favored class or classes whom the carrier was compelled to serve at a loss, to the detriment of other class or classes upon whom the burden of such loss would fall, that such legislation would be so inherently unreasonable as to constitute a violation of the due process and equal protection clauses of the Fourteenth Amendment."

³ *Western Union Tel. Co. v. Call Pub. Co.*, 181 U. S. 92; *Hays v. Pennsylvania Co.*, 12 Fed. 309; *Scofield v. Ry. Co.*, 43 Oh. St. 571; *Messenger v. Pennsylvania R. R.*, 36 N. J. L. 407; *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 321, 322.

of both the owner of the property and the public must be taken into consideration in the regulation of rates.¹ Although the purpose of the owner is to frame a schedule of rates which, as a whole, will yield the largest possible return, yet no such schedule can be successfully maintained unless the individual rates are such as will yield some return over the cost of the service. Viewing the situation from the standpoint of the public, its only interest is to secure reasonable individual rates, and the question of the gross profits is wholly immaterial. The favoritism resulting from regulation which compels the owner to furnish certain classes of service at less than cost and to charge the loss against the balance of the service, is wholly repugnant to the duty of public service. Although there may be some question about the rule at common law, yet statutory law in the United States and in most of the states compels such public service corporations as railroads to render service to all at reasonable rates and without unjust discrimination.² Any discrimination by a public service company which consists in rendering a service below its cost is unjust discrimination and unlawful. It is inconceivable that a method or test would be adopted which would compel the company to do the very thing which the statutes forbid. *Any fundamental rule, therefore, of rate regulation must preserve to the company both the right and the ability to render particular services at remunerative rates.*

An action was brought to enforce an order of the Interstate Commerce Commission directing certain railroads to cease charging a greater rate from the seaboard to Chattanooga than was charged to Nashville.³ The complaint was made under the fourth section of the Interstate Commerce Act, forbidding a greater aggregate charge for the shorter than for the longer haul on the same line. The court, however, held that the competitive condi-

¹ Covington, etc., Co. v. Sandford, *supra*, 596, 597; Smyth v. Ames, *supra*, 544.

² Interstate Commerce Act of 1887. Interstate Com. Com. v. B. & O. R. R., 145 U. S. 263; Western Union Tel. Co. v. Call Pub. Co., 181 U. S. 92, 100. Mr. Justice Brewer said: "As a consequence of this, all individuals have equal rights, both in respect to service and charges. Of course such equality of right does not prevent differences in the modes and kinds of service and different charges based thereon. There is no cast-iron line of uniformity which prevents a charge from being above or below a particular sum, or requires that the service shall be exactly along the same lines; but that principle of equality does forbid any difference in charge which is not based upon difference in service, and even when based upon difference in service it must have some reasonable relation to the amount of difference and cannot be so great as to produce unjust discrimination."

³ East Tennessee, etc., Ry. Co. v. Interstate Com. Com., 181 U. S. 1 (April 8, 1901).

tions at Nashville created the dissimilarity contemplated by the statute, and that the railroad companies were justified in making a lower rate to Nashville, provided such rate to Nashville was not less than the cost of service. Mr. Justice White said¹ that "if rates charged to the shorter distance point are just and reasonable in and of themselves, and if it is also shown that the lesser rate charged for the longer haul is not wholly unremunerative and has been forced upon the carriers by competition at the longer distance point" a discrimination in favor of the more distant point is not forbidden by the Interstate Commerce Act. Continuing, he said:²

"Take a case where the carrier cannot meet the competitive rate to a given point without transporting the merchandise at less than the cost of transportation, and therefore without bringing about a deficiency which would have to be met by increased charges upon other business. Clearly, *in such a case, the engaging in such competitive traffic would both bring about an unjust discrimination and a disregard of the public interest, since a tendency toward unreasonable rates on other business would arise from the carriage of traffic at less than the cost of transportation to particular places.* . . ."³

Applying the principle to which we have adverted to the condition as above stated, it is apparent that if the carrier was prevented under the circumstances from meeting the competitive rate at Nashville when it could be done at a margin of profit over the cost of transportation, it would produce the very discrimination which would spring from allowing the carrier to meet a competitive rate where the traffic must be carried at an actual loss. To compel the carriers to desist from all Nashville traffic under the circumstances stated would simply result in deflecting the traffic to Nashville to other routes, and thus entail upon the carriers who were inhibited from meeting the competition, although they could do so at a margin of profit, the loss which would arise from the disappearance of such business, without anywise benefiting the public."

The objection is urged that the public alone has the right to complain of discrimination which results in transferring the cost of rendering a certain class of service and placing the burden upon another class of service, and that the owner of the property affected has no constitutional rights which the courts will consider.⁴ This

¹ P. 18.

² P. 20.

³ The italics are the writer's.

⁴ In respect to the test laid down in *Smyth v. Ames*, Mr. Freund, in his work on *Police Power*, says, § 551: "It is true that under it unequal returns may be received

position fails to take into consideration the matters above considered. If the regulation compels a company to render a substantial, definitely ascertainable portion of its service at less than cost, it is inevitable that this loss must be distributed over the balance of the business, unless the owner can refuse to render the service. The latter alternative is impossible in case of public service companies. If the service carried at a loss results in burdening the balance of the service to any considerable amount, no court would sustain the reasonableness of the rates charged that portion of the business. In course of time all of the traffic carrying the unjust burden will by legal procedure or otherwise be relieved of the same. The question then arises, how can the company make good the deficit arising from the class of business which it is compelled to carry at a loss? Where the above state of facts exists the inevitable result is the impairment of the capital of the company. The judiciary should certainly not subscribe to the absurd contention that the railroad must wait until this burden has been shifted back before it can make the claim that such rates will result in impairing its property. So inevitable a result should and will be anticipated in the establishment of a proper test or rule for the determination of the constitutionality of specific rates.

A reasonable maximum rate, as used in a constitutional sense, therefore, cannot be determined without considering the rights of both the owner of the property and the public. These rights receive substantial protection by the rule laid down in *Smyth v. Ames* wherever the regulation consists of a schedule of rates based on the classification adopted by the owner. Where, however, this rule is wholly inappropriate for the determination of the reasonableness of the rate, the fundamental test must be the propriety of such maximum rate in respect to whether the rate will return to the owner the fair value, or at least the cost, of every substantial class of service demanded and rendered. This test affords ample protection to the public against unreasonable and extortionate rates of charge, and therein fulfils the only legitimate purpose of the police power in respect to purely economic interests. It encourages and permits individual effort and enterprise, and is thus in harmony

for equal services or equal returns for unequal services; but if the return on the whole business is fair, it must be that a too small return on some part of it is offset by a more than normal return on some other part; if, then, there is ground for complaint, it is on the part of a portion of the public and not on the part of the railroad company."

with that policy of government which grants to the individual the "utmost possible liberty and the fullest possible protection to him and his property."¹ The Fourteenth Amendment not only forbids the confiscation of property by the exercise of a usurped power, but also is a constitutional restriction against the improper exercise of a conceded legislative power. The function of the "due process of law" clause is to confine legislation within its proper limits. A state enactment, therefore, although purporting to be a legitimate exercise of the police power, is in fact a usurpation of power when it imposes upon a person rendering public service the duty of furnishing, and at the same time confers upon the public the right to demand, a substantial and definitely ascertainable class of service at less than cost.

Frank M. Cobb.

CLEVELAND.

¹ *Budd v. New York*, 143 U. S. 517, 551.

RIGHT OF A STOCKHOLDER, SUING IN
BEHALF OF A CORPORATION, TO COM-
PLAIN OF MISDEEDS OCCURRING PRIOR
TO HIS ACQUISITION OF STOCK.

DURING the past thirty-five years there has grown up in this country a considerable body of legal expression to the effect that, as a principle of equity, a stockholder suing in the right of a corporation to redress wrongs done the company, must have owned his stock at the time the wrongs were committed or must have had his shares devolve upon him thereafter by operation of law. The purpose of this article is to differ from such opinion.

It is difficult to suggest any sound theory whereby a stockholder suing in behalf of the corporation, and whose litigation if successful redounds to the benefit of all stockholders, should have an arbitrary limitation placed upon his right to sue. Corporate stock entitles the owner to share in all of the corporate assets, among which must be counted causes of action belonging to the corporation, and one of the most characteristic benefits of corporate organization is the continuing estate thereby created. The stockholder has no right to any specific part of the corporate assets: his rights are those ordinarily possessed by the holder of a chose in action,¹ which in the end are litigious rights. Again, the transferable value of shares is impaired if once it be understood that a transfer operates to cut off rights which the transferor would have had, and wrongs are imposed on purchasers who only on becoming stockholders can inspect the books of the company or otherwise, as matter of right, examine into corporate transactions. This is an answer, also, to the suggestion that a person purchasing stock should take the corporate situation as he finds it: why should he do so when he buys in ignorance of wrong done, and why should wrongdoers be given a shield against attempts to right the wrongs?

¹ *Colonial Bank v. Whitney*, 11 App. Cas. 426, 440, 447-8. See also the excellent opinions in the same cause in the Court of Appeal by Cotton, Lindley, and Fry, 11 J. 30 Ch. D. 261, 275, 282, 286.

The upholder of the view that a stockholder should not be permitted to sue for misdeeds occurring before his acquisition of stock, will answer with the claim of expediency: he will urge the undesirability of corporations being subjected to litigation and to having their internal dissensions aired in the courts. Certainly, however, the argument of hurting the credit of a company by litigation against it is counterbalanced by the prevention of fraud, breach of fiduciary obligation, or oppressive conduct by those in control. Moreover, see how the stockholder suing on behalf of the corporation is restricted by well-established limitations: he has no standing unless the corporation itself refuses to seek reparation for the wrongs done it.¹ Therefore he must first attempt to induce the directors, as they ordinarily represent the corporation, to take the desired action,² or must show some reason why application to them would be futile;³ as, for example, that they themselves are the wrongdoers and would therefore refuse to sue or else would have the conduct of litigation to whose success they would necessarily be opposed.⁴ And a mere naked demand is not enough. An earnest, not a simulated effort is required, and the stockholder must furnish the directors with the reasons which, if they refuse, he will allege in his bill, or else have no standing when he files it.⁵ Failing in relief from the directors and if time permits calling a stockholders' meeting, unless the wrongdoers dominate both stockholders and directors,⁶ he must attempt to obtain action through the stockholders, by the election of directors who will do their duty, or must otherwise seek to move the stockholders.⁷ And except in cases of fraud,⁸ the determination of the majority stockholders not to litigate will be conclusive.⁹

¹ *Porter v. Sabin*, 149 U. S. 473, 478.

² *Corbus v. Alaska, etc., Mining Co.*, 187 U. S. 455, 465.

³ *Siegman v. Maloney*, 65 N. J. Eq. 272.

⁴ *Bennett v. American Malting Co.*, 65 N. J. Eq. 375, 377; *Knoop v. Bohmrich*, 49 N. J. Eq. 82; *Brewer v. Proprietors of the Boston Theatre*, 104 Mass. 378, 387.

⁵ *Doherty v. Mercantile Trust Co.*, 184 Mass. 190.

⁶ *Mason v. Harris*, 11 Ch. D. 97, 107; *Bigelow v. Calumet & Hecla Mining Co.*, 155 Fed. 869, 879; *Wineburgh v. U. S., etc., Co.*, 173 Mass. 60, 62; *Montgomery Light Co. v. Lahey*, 121 Ala. 131, 135.

⁷ *I. & N. R. R. Co. v. Neal*, 128 Ala. 149; *Jones v. The Pearl Mining Co.*, 20 Colo. 417; *Wolf v. Shortridge*, 195 Pa. St. 191.

⁸ *Atwool v. Merryweather*, L. R. 5 Eq. 464, note; *Brewer v. Proprietors of the Boston Theatre*, 104 Mass. 378, 395.

⁹ *Foss v. Harbottle*, 2 Hare 461; *Dunphy v. Trav. Newspaper Ass'n*, 146 Mass. 495, 497. It has even been held that a majority of the stockholders may ratify actual

Again, the suitor must be a *bona fide* stockholder. He cannot have a few shares given him by a rival company and be maintained in his suit.¹ He must not have been guilty of acquiescence in the wrong,² and acquiescence has been defined as neglect promptly and actively to condemn the unauthorized act by suit.³ Nor must he have been guilty of laches.⁴ Neither must the corporation have lost the right to sue through its own laches,⁵ nor by the assent of all the stockholders to the act assailed.⁶ The ordinary rule applicable to choses in action, namely, that the transferee takes them *cum onere*, prevents suit by a transferee when the person from whom he derived his stock would have been barred from suit by laches or acquiescence.⁷

The above requirements and the fact that when a stockholder purporting to sue for the corporation is defeated he cannot recover costs and attorneys fees,⁸ should sufficiently guard the corporation against the prosecution of frivolous or vindictive suits.

No English case will be found, I believe, which holds that a stockholder may not sue to redress wrongs simply because they were committed before he acquired his stock. On the contrary, Lord Cairns, in the case of *Seaton v. Grant*,⁹ refused a motion to take a bill from the files where the plaintiff had bought five shares solely for the purpose of filing the bill, and Chelmsford, L. C., granted an injunction to a plaintiff who had bought his shares shortly before filing and to enable him to file his bill.¹⁰

fraud, if *intra vires*, against the protest of the minority. *Kessler v. Ensley Co.*, 123 Fed. 546.

¹ *Forrest v. Manchester, etc., Ry. Co.*, 4 De G. F. & J. 126, 130; *Rogers v. The Oxford, etc., R. R.*, 2 De G. & J. 660, 674.

² *Post v. Beacon, etc., Co.*, 84 Fed. 371; *Wormser v. Metropolitan St. Ry. Co.*, 184 N. Y. 83; *Powers v. African Tug Co.*, [1904] 1 Ch. 558.

³ *Rabe & Cross v. Dunlap*, 51 N. J. Eq. 40, 48.

⁴ *Peabody v. Flint*, 6 Allen (Mass.) 52; *Kent v. Quicksilver Mining Co.*, 78 N. Y. 159, 185; *Moore v. The Silver, etc., Mining Co.*, 104 N. C. 534, 546.

⁵ *Kessler v. Ensley Co.*, 123 Fed. 546, 550; s. c. 141 Fed. 130; aff. 148 Fed. 1019.

⁶ *Old Dominion, etc., Co. v. Lewisohn*, 148 Fed. 1020.

⁷ *Kent v. Quicksilver Mining Co.*, *supra*; *Venner v. At. T. & S. F. R. Co.*, 28 Fed. 581, 591; *Farwell v. Babcock*, 27 Tex. Civ. App. 162, 173; *Ffooks v. The South-western Ry. Co.*, 1 Smale & G. 142. See, however, *Parsons v. Joseph*, 92 Ala. 403.

⁸ *Louisville Bridge Co. v. Dodd*, 27 Ky. L. Rep. 454, 455, 85 S. W. 683; *McCourt v. Singers-Bigger*, 145 Fed. 103, 113, 114.

⁹ L. R. 2 Ch. 459.

¹⁰ *Bloxam v. Metropolitan Ry. Co.*, L. R. 3 Ch. 337. See *Salisbury v. Metropolitan Ry. Co.*, 38 L. J. Ch. 240, 251.

Moreover, in this country, as late as 1875, the Supreme Court of New Hampshire,¹ in overruling a demurrer interposed for failure to allege that the plaintiffs were owners of stock at the time of the wrongs complained of, declared that no authority was referred to in support of it, and that the court saw no sound reason upon which it could be sustained. Since then, however, a contrary view has found support, owing, it is submitted, to a misapprehension of the scope and purpose of a rule of practice adopted by the Supreme Court of the United States. This rule, the 94th, was promulgated January 23, 1882,² and is as follows:

"Every bill brought by one or more stockholders in a corporation, against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law; and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action."

Appeal to the federal courts by corporations through collusive suits brought by their stockholders had resulted with great frequency after the decision in 1855 of the case of *Dodge v. Woolsey*.³ That was a suit for injunction, brought by Woolsey, a citizen of Connecticut and a stockholder in an Ohio bank, against the bank, its directors, and one Dodge, a state tax collector, to prevent the bank from paying and the collector from receiving the tax, imposition of which it was alleged would impair the bank's contract with the state and destroy the bank. Severe penalties would have resulted from refusal to pay the tax. The directors of the bank had been requested by the plaintiff and had refused to take action because of the obstacles in the way of testing the law in the courts of the state.⁴ Under these circumstances the Supreme Court held that the action of the board of directors was not merely an error of judgment, but a breach of duty, and finding that the state had passed an act violating the obligation of its contract with

¹ Winsor v. Bailey, 55 N. H. 218, 221.

² 18 How. (U. S.) 331.

³ 104 U. S. 1x.

⁴ P. 340.

the bank, allowed the injunction. When it was urged¹ that the suit was a contrivance to confer jurisdiction on the federal court, the court replied that that should have been proved by the defendants and would not be presumed. Thereafter, it became the regular practice either to have a non-resident stockholder sue the corporation, or if there were no non-resident stockholder, to have a few shares transferred to some non-resident who would, upon refusal of the board of directors to act, bring suit in the federal court. This narrative will be found recounted with some indignation by Justice Miller in the case of *Hawes v. Oakland*,² decided in the October Term 1881, where the stockholder, a citizen of New York, sued a California water works corporation and the city of Oakland, California, to prevent the company furnishing water free to the city for all purposes, with no obligation, it was maintained, on its part to do so, and with the alleged result that the dividends on the plaintiff's stock were diminished and its value impaired. Justice Miller was determined that collusive suits in the federal courts should end. He distinguished the case of *Dodge v. Woolsey* on the ground that there the injury was one which threatened to disrupt the corporation by the permitted payment of an unconstitutional tax, whereas the furnishing of water to the city of Oakland for all purposes he regarded as not beyond the power of the corporation, and conduct which might have been the exercise of highest prudence. There was no irremediable injury of any kind, and nothing to show that a *bona fide* request had been made of the directors to bring the suit. The following paragraph appears in the case:³

"The efforts to induce such action as complainant desires on the part of the directors, and of the shareholders when that is necessary, and the cause of failure in these efforts should be stated with particularity, *and an allegation that complainant was a shareholder at the time of the transactions of which he complains, or that his shares have devolved on him since by operation of law*,⁴ and that the suit is not a collusive one to confer on a court of the United States jurisdiction in a case of which it could otherwise have no cognizance, should be in the bill, which should be verified by affidavit."

The phrase italicized, stated in an opinion much of which is a diatribe against attempted fraud on the jurisdiction of the court,

¹ P. 346.

³ P. 461.

² 104 U. S. 450.

⁴ The italics are the writer's.

and without authority quoted or argument advanced to support it, has been the chief justification for the dicta of state courts and the contention of law writers, that stockholders cannot sue for wrongs occurring before their acquisition of stock.

The 94th equity rule was adopted shortly after this decision was rendered, and after the credulity exhibited in *Dodge v. Woolsey* had given way to well-grounded suspicion evidenced in it and also in the case of *Huntington v. Palmer*,¹ decided at the same term and reported in the same volume, where a stockholder had sued in behalf of the corporation, and Justice Miller dismissed the bill because there was "nothing to repel the reasonable presumption that parties were improperly and collusively made in order to invoke the jurisdiction of the federal court." It certainly is not a rule of equity to impute fraud to a suitor, nor is it a requirement that a bill shall be verified by oath.² And further, the 94th rule does not apply in cases where the court has jurisdiction irrespective of citizenship under the Constitution or laws of the United States.³

Nothing need be added, however, in view of Justice Miller's explanation of the reason for equity rule 94, furnished in the case of *Quincy v. Steel*.⁴ He therein mentions the many collusive suits brought before and after the attempt to remedy the evil by the act of March 3, 1875. He refers to the cases of *Hawes v. Oakland* and *Huntington v. Palmer*, and says⁵ that "In order to give effect to the principles there laid down, this court at that term adopted rule 94 . . ." And later in the opinion⁶ he specifically refers to the failure of the complainant in the case before him to comply with "the rule of practice laid down for equity courts in such cases . . ." Indeed, this must be a rule of practice, since it is only such rules that the Supreme Court is authorized to make, and it cannot by rule alter the substantive law.⁷

Since this rule was established, the federal courts, in suits begun in them, have necessarily followed it,⁸ and their decisions

¹ 104 U. S. 482.

² *Hughes v. Northern Pac. Ry. Co.*, 18 Fed. 106; *Groel v. United Electric Co. of N. J.*, 132 Fed. 252, 257; *Maeder v. Buffalo Bill's Wild West Co.*, 132 Fed. 280 (holding that the requirement of verification does not apply on removal).

³ *Kimball v. City of Cedar Rapids*, 99 Fed. 130, 131; *Ball v. Rutland*, 93 Fed. 513.

⁴ 120 U. S. 241.

⁵ P. 245.

⁶ P. 248.

⁷ 1 Mor., Priv. Corp., 2 ed., § 269.

⁸ *Dimpfell v. O. & M. Ry. Co.*, 110 U. S. 209; *Bimber v. Calivada, etc., Co.*, 110 Fed. 58.

should not therefore be regarded as authority against the subsequent stockholder in jurisdictions where the rule does not obtain.¹ This has been decided in a number of states where a subsequent stockholder is allowed to sue.²

In the case of *Forrester v. Boston, etc., Mining Co.*³ it is asserted that the proposition that a transferee of stock gets at least the rights of the prior holder is so well established, and rests upon such solid foundation, that the citation of authorities in support of it is useless. On the other hand, editorial comment in 1902 in a law magazine⁴ on the case of *Farwell v. Babcock*,⁵ which, by the way, went on the ground that the assignor of the plaintiff had assented to the act complained of, and expressly disclaimed deciding that under no circumstances could a stockholder sue to set aside fraudulent contracts made with the company or its board of directors unless he owned his stock at the time of the wrong, finds the weight of authority just the other way. Examination of the cases relied on, however, shows that they do not support this latter contention. In two of them the complaining stockholders were guilty of acquiescence for years, and also failed either to make demand on the directors to conduct the litigation or to furnish a reason for failure to make the demand.⁶ In another case all the stockholders had consented to the act complained of.⁷ And in still another the corporator was barred by participation of his transferor in the wrongful act.⁸ If a stockholder were not barred under such circumstances, it might be that he would be attacking the very stock by virtue of the ownership of which he sues.⁹

The most elaborate attempt in a state court to treat the federal

¹ *Evans v. Union Pac. Ry. Co.*, 58 Fed. 497.

² *Montgomery Light Co. v. Lahey*, 121 Ala. 131, 136; *Parsons v. Joseph*, 92 Ala. 405; *Miller v. Murray*, 17 Colo. 408, 415; *Forrester v. Boston, etc., Mining Co.*, 21 Mont. 544, 550, on rehearing, *Ibid.* 565; *City of Chicago v. Cameron*, 22 Ill. App. 91, 104; *Tevis v. Hammersmith*, 31 Ind. App. 281, rehearing denied and appeal to supreme court dismissed; *Bennett v. Am. Malting Co.*, 65 N. J. Eq. 375, 377-8; *Dissette, Exec. v. Lawrence, etc., Co.*, 9 Oh. Cir. Ct. Rep. (N. S.) 118, 120; *O'Connor v. The Virginia, etc., Co.*, 46 Misc. (N. Y.) 530, 535-6. See also *Ramsey v. Gould*, 57 Barb. (N. Y.) 398; *Hanna v. Lyon*, 179 N. Y. 107, 110.

³ 21 Mont. 544.

⁴ 54 Cent. L. J. 381.

⁵ 27 Tex. Civ. App. 162.

⁶ *Alexander v. Searcy*, 81 Ga. 536, 544-7; *Dimpfell v. O. & M. Ry. Co.*, 110 U. S. 209.

⁷ *Clark v. American Coal Co.*, 86 Iowa 436.

⁸ *United Electric Securities Co. v. Electric Light Co.*, 68 Fed. 673, 675.

⁹ *Venner v. At., T. & S. F. R. Co.*, 28 Fed. 581, 591.

rule as one expressive of general equity principles is found in the *Home Fire Insurance Co. v. Barber*,¹ where the court says that the right of suit is for the special injury to the stockholder,² and that he does not in buying shares buy his vendor's right of action for past injuries.³ The case confounds suits by the stockholder for himself, and cases where he sues in the right of the corporation. Apparently, too, all of the stockholders had consented to the wrong complained of. The argument that the federal rule is one of equity, because if intended only to guard against collusive suits it would have been limited to cases in which the suitor's vendor was a citizen of the same state as the corporation, obviously proceeds from insufficient reading of the case of *Hawes v. Oakland*, where, if the rule had been as maintained, it would not have reached the complainant.

Although the federal courts are bound to follow the rule in cases begun in them, the question of their so doing in removable cases is important. Federal courts will decide questions of general law for themselves,⁴ follow their own decisions, and not be bound by decisions of the state from which a case is removed; but if the federal decisions on a question rest on a rule of practice only, then a federal court on removal should follow the state decisions. It has been decided within the year,⁵ in the federal Circuit Court for the Southern District of New York, that the 94th rule governs in a cause removed from a state court where a stockholder need not have owned his stock at the time of the wrong of which he complains. The court emphasizes the fact that *Hawes v. Oakland* was decided before the rule was promulgated; but it is submitted, nevertheless, that the statement therein that subsequent stockholders cannot redress corporate wrongs was dictum, and that the real ground of decision of *Hawes v. Oakland* was the collusive nature of the suit, and the fact that no irreparable injury was shown and no demand first made upon the acting body of the corporation. The court was also influenced by the anomalous result⁶ which would refuse a suitor a cause of action if his suit were originally begun in the federal court, and

¹ 67 Neb. 644.

² P. 658. Cf. *Zinn v. Baxter*, 65 Oh. St. 341, 365.

³ P. 650.

⁴ *Burgess v. Seligman*, 107 U. S. 20.

⁵ *Venner v. Great Northern Ry. Co.*, 153 Fed. 408; cf. *Evans v. Union Pac. Ry. Co.*, 53 Fed. 497.

⁶ P. 417.

would allow it if removed there. While not entirely relevant perhaps in this discussion of the theory upon which a stockholder's suit for the corporation may be maintained, it may with deference be suggested in answer that the result is equally deplorable when a suitor begins a good action in a state court and is defeated by removal. The unfortunate result of the rule limiting causes of action to stockholders owning stock contemporaneously with the commission of the wrong, is clearly illustrated in the case. A stockholder holding stock worth \$100,000 was prevented thereby from maintaining an otherwise good cause of action on behalf of the corporation.

It is, of course, settled law that a person cannot maintain suit for the corporation after he ceases to be a stockholder.¹ The consequence is that if there be but one good man in corporate Gomorrah and he sells his stock, no one can compel restitution for fraudulent acts.

Murray Seasongood.

CINCINNATI, December, 1907.

¹ *Hanna v. Lyon*, 179 N. Y. 107, 110, 111; *Scanlan v. Snow*, 2 D. C. App. Cas. 137.

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JURISDICTION OF FEDERAL COURTS TO ISSUE WRIT OF HABEAS CORPUS TO RELIEVE FROM COMMITMENT BY STATE COURT. — The Judiciary Act of 1789¹ did not empower the federal courts to issue the writ of *habeas corpus* in the case of a prisoner held under commitment by a state court or magistrate, except *ad testificandum*.² By reason of the nullification acts and the interference of South Carolina with the enforcement of the federal revenue laws, however, the Act of March 2, 1833, was made necessary; it provided that the writ should extend to prisoners committed or confined for any act done or omitted to be done in pursuance of a law of the United States or in pursuance of any order, process, or decree of any court or judge thereof.³ These provisions are retained in section 753 of the Revised Statutes, by force of which writs of *habeas corpus* are issued by the federal courts today; this section also extends the writ to persons in custody in violation of the Constitution of the United States, etc. All these enactments can be said to have been forced upon Congress by the attempt of the states to obstruct the rights of persons under the federal government.⁴ A case of such obstruction and peculiarly a proper occasion for the granting of the writ was the recent conflict between the state officials of North Carolina and the local federal court. This court, in its well-established right,⁵ enjoined the individuals charged with the administration of a state law defining maximum railway rates from enforcing them *pendente lite*, on the ground of unconstitutionality.⁶ But although the state authorities obeyed the positive inhibi-

¹ § 14, 1 Stat. at L. 82.

² See *Whitten v. Tomlinson*, 160 U. S. 231, 239.

³ § 7, 4 Stat. at L. 634. See *In re Neagle*, 135 U. S. 1, 70.

⁴ See *In re Neagle*, *supra*.

⁵ See 1 HARV. L. REV. 223; 20 HARV. L. REV. 238.

⁶ *Southern Ry. Co. v. McNeil*, 155 Fed. 756.

tion, they sought indirectly, by prosecuting and fining the complainant and its employees for failure to comply with the act, to nullify the benefit of the injunction and to imprison an employee for acting in conformity with it. He was, therefore, "in custody for an act done . . . in pursuance . . . of an order, process, or decree" of a federal judge, and the court properly dismissed him on a writ of *habeas corpus*. *Ex parte Wood*, 155 Fed. 190 (Circ. Ct., W. D. N. C.).

That this decision should be criticized adversely is not because the federal court lacked the authority to issue the writ, but because many federal courts regard the granting of the writ as a matter of discretion.⁷ By attempting to interpret the intention of Congress,⁸ but without express legislative restriction,⁹ they have limited the granting of the writ, leaving the petitioner whose action has arisen in a state court to pursue his writ of error to the highest court of the state and thence, if unsuccessful, to the Supreme Court of the United States.¹⁰ It is sometimes said that comity demands this rule.¹¹ But if comity means anything, it means the courtesy of equals. That courts are not foreign offices, however, and that the jurisdiction of a state is subordinate to that of the United States, even where concurrent, seem equally indisputable.¹² The explanation of the rule is rather that the usual occasion for denying the writ is when the petitioner, prosecuted under the criminal law of a state, claims to be held in violation of the Constitution of the United States; and that the indiscriminate issuing of the writ in such cases would seriously embarrass the administration of the criminal law of the states.⁸ However necessary the rule may be,¹³ the petitioner's right seems reduced, in the court's discretion, to a possible privilege. But the Supreme Court does not sufficiently justify this discretion, though it makes exceptions to the rule in urgent cases, awarding the writ "forthwith to the party entitled to it."¹⁴ It is unnecessary, however, to bring the principal case within these exceptions. The rule and the exceptions should be confined to cases where parties are held in custody in violation of the Constitution. A party's rights and liberty are not ordinarily prejudiced when the state court is allowed to pass on the constitutionality of a statute under which he is indicted; but it is otherwise when he is held in custody for an act done in pursuance of a law of the United States, or for an act done in obedience of an order of a federal court. The federal court should then have no discretion in issuing the writ of *habeas corpus*, for the petitioner, as in the principal case, has an absolute right to have his case heard and disposed of in the court whose sovereign he served and whose decrees he obeyed.¹⁵

THE DELEGATION OF LEGISLATIVE POWER.—It is commonly held that although the legislature may not confer legislative power upon other persons or bodies, administrative powers and duties may be delegated. The ten-

⁷ *Ex parte Royall*, 117 U. S. 241.

⁸ See *Ex parte Royall*, *supra*, 251.

⁹ Cf. U. S. Rev. Stat. §§ 751, 755.

¹⁰ *Reid v. Jones*, 187 U. S. 153.

¹¹ See *In re Neagle*, 39 Fed. 833, 845.

¹² See *Ex parte Siebold*, 100 U. S. 371, 392.

¹³ See 6 Rep. Am. Bar Ass'n, 243; 25 Am. L. Rev. 149.

¹⁴ See *Ex parte Royall*, *supra*, 250; cf. U. S. Rev. Stat. § 755; *In re Fitton*, 45 Fed. 471, 474.

¹⁵ See *In re Neagle*, 39 Fed. 833, 844.

dency of the courts has been to characterize the power brought in question as either legislative or administrative without careful analysis of its qualities. It seems, however, that the power, delegation of which is prohibited, is this; to lay down rules by which courts of law must determine the rights and obligations of others. If that is the only power which cannot be delegated, it follows that such delegation of power as that given to a commission to pass rules or by-laws by which it is to proceed, is not forbidden.¹ Similarly it would seem that power to choose the time or place or manner in which the board will execute an order of the legislature, may properly be delegated.² But power to issue orders that third persons shall make such changes in their property as the officer deems necessary, failure to obey which shall be punishable as a misdemeanor,³ or a discretion to give or withhold the license of the state to perform certain acts,⁴ is power to create a new rule of law by which the rights and obligations of third persons are determined. This view is justified by a recent decision of the Supreme Court of Minnesota which held that a statute which permitted a commission in its discretion to authorize increases in the capital stock of railroad corporations and to prescribe the manner in which such increase should be made, delegates legislative power and therefore is void. *State v. Great Northern Ry. Co.*, 100 Minn. 445.

The unfortunate limitations which a rule of non-delegability of such power imposes upon the exercise of governmental functions compels an examination of the principles upon which the doctrine rests. In its form as an American constitutional "maxim" the theory probably received its first full acceptance in the "referendum cases" of the fifth and sixth decades of the last century.⁵ The principle of those cases was that ours is a representative government and the legislatures cannot be permitted to shift their responsibility by a change of the governmental form to the purely democratic through the device of a submission of measures to a popular vote.⁶ The effect of these particular decisions has been evaded by the doctrines of conditional legislation and of local self-government,⁷ but the statement that legislative power is not delegable has been constantly repeated by courts and text-writers. The reason of those decisions, however, cannot apply to a delegation of such powers to individuals or commissions. The suggestion that the legislature is an agent whose powers are non-delegable seems only a modest form of begging the question by the use of an unwarranted analogy.⁸ It is to be noticed that none of our constitutions appear to forbid, expressly, the delegation of legislative power, except to the co-ordinate executive and judicial departments. In the absence of such prohibition it would seem that the ordinary rule of construction of state

¹ *Hildreth v. Crawford*, 65 Ia. 339, 343.

² *State v. Bryan*, 50 Fla. 293. But *cf.* *State v. Budge*, 105 N. W. 724 (N. D.).

³ *Schaezlein v. Cabaniss*, 135 Cal. 466. But see *Union Bridge Co. v. United States*, 204 U. S. 364.

⁴ *Noel v. People*, 187 Ill. 587; *Harmon v. State*, 66 Oh. St. 249. *Cf.* *O'Neil v. Insurance Co.*, 166 Pa. St. 72; *Fite v. State*, 88 S. W. 941 (Tenn.). But *cf.* *State v. Wagener*, 77 Minn. 483.

⁵ A clue to the turn taken by these cases is offered by an examination of the theory of the governmental compact. See Willoughby, *The Nature of the State*, 54 *et seq.*, *Opinion of the Justices*, 160 Mass. 586, 595; *Cooley, Const. Lim.*, 7 ed., 163 n. 1.

⁶ *Parker v. Conn.*, 6 Pa. St. 507.

⁷ See *Cincinnati, etc., R. R. Co. v. Commissioners*, 1 Oh. St. 77; *State v. Cooley*, 65 Minn. 406.

⁸ But see *McClain, Const. Law*, 62.

constitutions — that what is not forbidden is granted — should be applied. The public policy of permitting such delegation is perhaps best shown by the many cases which have, in fact, allowed it under the guise of "powers merely administrative." When violations of the rules made by state boards of health⁹ or park commissions¹⁰ are held punishable as offenses against the state, when the orders of railroad commissions are given the effect of positive law,¹¹ when the authority of examining boards¹² and executive councils¹³ to grant or refuse the license of the state to exercise certain professions or occupations is constantly upheld, it is futile to contend that our courts do not sustain delegations of legislative power. Nor is a discretion to fix a rule of law for a third person any the less a legislative power because the range of choice which the commission is authorized to exercise is limited by standards of fairness and reasonableness.¹⁴ The serious difficulties in the path of full delegability of legislative power are the common constitutional provisions as to the manner in which laws shall be enacted.¹⁵ However, as these provisions have never stood in the way of delegations of legislative power to municipal and other local governmental bodies, it is easily possible that they apply only to enactment of formal statutes by the general assemblies.¹⁶

WHEN REDRESS FOR A TORTIOUS ACT COMMITTED IN A FOREIGN JURISDICTION WILL BE REFUSED. — While the general rule is that redress for a tort may be had in any jurisdiction where the wrongdoer may be found, certain exceptions exist. If the enforcement of a foreign law, which determines the existence of the tort and the right to recover, would be contrary to public policy as interpreted in the jurisdiction of the forum, the court will decline to act. This is clearly justified if the foreign law is contrary to morality or natural justice, but many courts refuse redress on this ground unless the law of the forum is similar to the foreign law.¹ Courts taking this position fail to grasp the fundamental conception that the obligation sued on is not based on the domestic but on the foreign law.² Courts sometimes refuse a remedy for a right arising solely under a foreign statute, such as the right to recover for death by wrongful act, but the better view is that there is no public policy against enforcing such laws.³ Of course, foreign penal laws will not be enforced, for these are in the nature of a punishment for a wrong to the sovereign, which will not be dealt with by another state. Another, but unsound exception is that there can be no recovery for torts involving foreign real estate.⁴ It is said such torts are not transitory but

⁹ *Blue v. Beach*, 155 Ind. 121; *Pierce v. Doolittle*, 130 Ia. 333. *Contra*, *State v. Burdge*, 95 Wis. 390.

¹⁰ *Brodine v. Revere*, 182 Mass. 598.

¹¹ *Georgia R. R. v. Smith*, 70 Ga. 694; *Matter of N. Y. Elevated R. R. Co.*, 70 N. Y. 327.

¹² *Ex parte McManus*, 90 Pac. 702 (Cal.).

¹³ *Brady v. Mattern*, 125 Ia. 158. See *State v. Hagood*, 30 S. C. 519.

¹⁴ But see *In re Thompson*, 36 Wash. 377; *State v. Briggs*, 45 Ore. 366.

¹⁵ See *Santo v. State*, 2 Ia. 165, 204; *People v. Election Commissioners*, 221 Ill. 9.

¹⁶ See *Wentworth v. Racine County*, 99 Wis. 26; *Georgia R. R. v. Smith*, *supra*.

¹ *Ash v. Baltimore, etc.*, R. R. Co., 72 Md. 144; *The Halley*, L. R. 2 P. C. 193.

² *Cf. Machado v. Fontes*, [1897] 2 Q. B. 231, allowing recovery for a foreign act which, though illegal, did not give rise to a civil liability in the foreign jurisdiction.

³ *Herrick v. Minn., etc., Co.*, 31 Minn. 11.

⁴ *Livingston v. Jefferson*, 1 Brock. (U. S.) 203. *Contra*, *Little v. Chicago*, 65 Minn. 48.

local ; that is, the right could arise in no other place. This immaterial argument has also been applied to statutory torts ; for a right under a particular statute can arise in no other jurisdiction, and on this ground a few courts refuse relief, again disregarding the fact that the right sued on is based solely on the foreign law.⁵

A recent case apparently adopts a new exception, that redress will not be given when the law of the foreign state forbids recovery outside the jurisdiction. A Nevada statute granted a right of action for negligence, but provided that this liability should exist only as ascertained by the courts of Nevada. When suit was brought in a federal court in Utah, relief was denied. *Coyne v. Southern Pacific Company*, 155 Fed. 683 (Circ. Ct., Dist. Utah). The result seems unsound, for it is a familiar rule that when a right exists the law of the forum governs the procedure and the remedy. The court was confused by cases where the *lex loci* gives a right only to a peculiar kind of remedy, and where consequently courts cannot afford relief if the law of the forum provides no machinery for that kind of a remedy. Thus, when a Mexican statute gave a right to recover for death by wrongful act and provided that the damages be paid in instalments, the United States court could not properly enforce the right, since it had no power to issue such a decree, and consequently all redress was refused.⁶ This class of cases forms a true exception to the general rule under discussion. But if the proper remedy can be granted, the vital question is the existence of the right. So, although in general the statutes of limitations of the forum govern because that is ordinarily a matter of remedy, it is perfectly possible for the law of the place of the act to limit the existence of a particular right to a certain period, after the expiration of which no suit can be brought in any jurisdiction.⁷ Similarly it would be possible to make a right destroyable by certain acts such as bringing suit in another jurisdiction. But if the right still exists, a declaration by one state that no remedy shall be given in another state is an attempt to legislate for all the world and to limit the jurisdiction of foreign courts, which must necessarily be futile.

JURISDICTION OF EQUITY TO AVOID A MULTIPLICITY OF SUITS WHEN ONE IS ARRAYED AGAINST MANY.—Recently there came before the Wisconsin court an interesting case involving equity's jurisdiction to avoid a multiplicity of suits. *Illinois Steel Co. v. Schroeder*, 113 N. W. 51. Eighty-four squatters claimed title to the plaintiff's land through their adverse possession tacked to that of M, under whom each claimed. The plaintiff denied M's possession, and had recovered in ejectment against one holding under the same claim. To avoid having to bring eighty-four identical suits, he sought to join all the defendants in one equitable suit and to have the matter set at rest. The defendants interposed a demurrer, which was sustained. First it must be noticed that the plaintiff had no other ground for getting into equity, so that there was a problem apart from joinder of parties in equity,—a distinction frequently overlooked in judicial discussions. The initial difficulty of the court was the lack of privity among the defendants ; that is, they had no common title or community of interest in the subject-matter. Some courts

⁵ *Crippen v. Loughton*, 69 N. H. 540.

⁶ *Slater v. Mexican, etc., Co.*, 104 U. S. 120.

⁷ See 18 HARV. L. REV. 220.

have insisted strenuously on this requirement, but the weight of authority is now clearly the other way.¹ The basis of the bill is to afford the plaintiff a more nearly adequate remedy than he has at law, and to promote the convenience of the public and of the court by having one suit instead of many.² Privity seems entirely foreign to these conceptions, and to require it would considerably narrow a beneficent relief which Kent called a favourite one with equity.³ In the following discussion it will be assumed that lack of privity is not an objection.

Suppose the bill asked only for a declaration as to M's possession. It would raise a question of law and fact common to all defendants. Such a declaration would make this question *res adjudicata* in subsequent ejectment suits by the plaintiff, thus saving for the courts much time, and for the plaintiff the burden of repeated proof. The bill, however, would be professedly not to prevent a multitude of suits, but to aid the plaintiff in bringing them. Equity has not reached the point of allowing such bills.⁴ Next, suppose each of many persons claimed under a statute part of a tract of land possessed by A, and started individual ejectment suits. A would come to equity to show all his opponents' claims to be groundless by proving the statute unconstitutional, and to have them accordingly enjoined. The bill, if proved, would prevent many suits, while if not proved, would cause a saving in future legal suits. Equity would allow such a bill.⁵ Thirdly, suppose A brings separate ejectment suits against several parties in possession, who seek to enjoin him because of the unconstitutionality of the statute under which he claims. Here each plaintiff would have only one suit to fight at law, but the element of saving the court's time would still be present, and the bill would be allowed.⁶ Fourthly, suppose many passengers were injured in a collision caused by the negligence of a railroad company, and they come into equity for damages. There would be the common question of the company's negligence, but another element would enter. The ascertainment of the relief to be given would raise a question concerning each plaintiff, and the result would be a number of issues, each involving only one party. Equity would draw the line here, and refuse damages whether sought alone or with other relief.⁷ The result would be the same if one sought damages from many.⁸ But when the damages are liquidated, so that the ascertainment of relief as to each party is a negligible consideration, the reason fails and the relief is given.⁹ Similarly in the case before the Wisconsin court the ascertainment of the affirmative legal relief against each defendant would be a negligible consideration, since it would be only a decree to surrender up possession. There is a common question here, for if the plaintiff can eliminate M's possession, the claims of all defendants must fail.

¹ *Carlton v. Newman*, 77 Me. 408; *Hale v. Allinson*, 188 U. S. 56, 77. *Tribette v. Illinois Central R. R.*, 70 Miss. 182, the leading case *contra*, no longer represents Mississippi law. *Crawford v. Mobile, etc.*, R. R., 83 Miss. 708, 717.

² *Smith v. Bank of New England*, 69 N. H. 254.

³ *Brinkerhoff v. Brown*, 6 Johns. Ch. (N. Y.) 139, 151.

⁴ Such a bill was allowed in a recent case without any discussion or reasoning. *Blumer v. Ulmer*, 14 So. 161 (Miss.).

⁵ *Sheffield Waterworks v. Yeomans*, L. R. 2 Ch. 8; *Albert Lea v. Nielsen*, 83 Minn. 246.

⁶ *Chicago v. Collins*, 175 Ill. 445. But see *Turner v. Mobile*, 135 Ala. 73, 125.

⁷ *Tompkins v. Craig*, 93 Fed. 885; *Smith v. Bivens*, 56 Fed. 352; *Foreman v. Boyle*, 88 Cal. 290; *State v. Sunapee Dam Co.*, 72 N. H. 114, 143.

⁸ *German, etc., Co. v. Van Cleave*, 191 Ill. 410; *Smith v. Bank of New England, supra*.

All the elements in previous cases in which the bill was allowed are present; there is the saving to both the court and the plaintiff; and it would seem that the demurrer should have been overruled.⁹

EQUITABLE DECREE AS A CAUSE OF ACTION IN ANOTHER STATE. — Under the Constitution of the United States a valid judgment must be given full faith and credit in the courts of another state.¹ This does not, however, mean that it must be given an effect which could not be given to domestic judgments, nor that the machinery of one state must execute the orders of the courts of other states in matters of procedure. Decrees of equity offer the best examples of these principles. A decree which orders the payment of a definite sum of money will sustain an action of debt in another state for amounts already due.² But as to future payments, a present decree is not conclusive, for there is no debt and consequently no existing right of action.³ As to interests in land, a decree of a court of the situs is binding everywhere, and if, for example, the defendant in a suit for specific performance leaves the jurisdiction without making a conveyance, suit may be maintained upon the contract wherever he can be found; the obligation can be proved by the decree of the court of the situs, and he will be forced to convey.⁴

When the land lies in another state, the effect of a decree is more limited because the power of the court is limited. A decision *in rem*, such as one declaring void a deed of land in another state, is of no effect whatever, since the court necessarily lacks jurisdiction over the land.⁵ But if the decree is strictly *in personam* upon an antecedent obligation which is in issue, it is well settled that a decree is conclusive as to land lying in another state. For example, a decree of specific performance of a contract is binding on the court of the situs.⁶ A decree for the conveyance of land on the settlement of a partnership is similarly conclusive.⁷ The reason is that if suit on the obligation be brought at the situs, the decree is conclusive evidence of the issues involved. But it is to be noticed that the first court has attempted to create no new interest in the land, but rather that the decree is *in personam* to effectuate rights already existing by the law of the situs. Indeed, the court is bound to determine the suit by the law of the situs whether it accords with its own law or not.⁸

When, however, no antecedent obligation exists by the law of the situs, a decree of another state is without force, for it cannot create such an obligation as to land outside its jurisdiction. Nor does any procedure exist for suing on such a decree. It is evidence, and evidence is useless without a cause of action. Another reason is that any such order is necessarily merely auxiliary to the decree and partakes only of the nature of execution.

⁹ The bill may be demurrable because the plaintiff also asked for damages, which would be unliquidated; but this point was untouched by the court. See Foreman v. Boyle, *supra*.

¹ Art. IV, § 1.

² Bullock v. Bullock, 57 N. J. L. 508.

³ Lynde v. Lynde, 181 U. S. 183.

⁴ Roblin v. Long, 60 How. Pr. (N. Y.) 200.

⁵ Carpenter v. Strange, 141 U. S. 87.

⁶ Burnley v. Stevenson, 24 Oh. St. 474.

⁷ Dunlap v. Byers, 110 Mich. 109.

⁸ Knox v. Jones, 47 N. Y. 389. See 20 HARV. L. REV. 382.

A party cannot seek to enforce the procedure of a court beyond its jurisdiction. Such a situation is suggested by a recent Nebraska case where, in divorce proceedings, the court ordered a conveyance of land situated in another state. *Fall v. Fall*, 113 N. W. 175. The prospective grantee brought a bill in the court of the situs to quiet title. The bill, of course, failed, because no title, legal or equitable, could be created by the other court, and no other right in the land was alleged. Nor could the plaintiff have succeeded in any other way. The order was simply a part of the procedure of the court, just as it might award future alimony or security therefor. If it does not execute such orders, no right of action exists upon which to have execution in another state.⁹

THE POWER OF A TRUSTEE TO LEASE TRUST PROPERTY.—Where a trustee has legal title to land and is charged with the active duty of raising an income therefrom, he is confronted with the problem as to whether or not he has power to lease, and if he has, to what extent. There can be no implied power to lease where the trust is a passive one,¹ or where the trust instrument indicates a contrary intention.² And where the instrument expressly grants power to lease for a specified term, no authority can be implied to grant a longer lease, or to deviate in any way from the limitations of the grant.³ Clearly, where the trust must terminate at a given time, the trustee cannot lease beyond that time, and no lease beyond his power will bind the remainderman. But where the trust deed is silent as to the right to lease and the trust is for an indefinite period, the trustee has an implied power to lease for the shortest period essential to the economical use of the land, provided that such lease is not likely to extend beyond the duration of the trust.⁴ The circumstances which determine whether or not the trustee's action has been reasonable are reviewed in a recent Iowa case. *In re Hubbell Trust*, 113 N. W. 512. The nature of the property to be leased is an important element. Thus, leases of agricultural land may often be advantageously made for short periods, while mining leases and leases of city lots, where the lessee must be allowed to build or make improvements in order that the land may be productive, may require comparatively long terms.⁵ The business usage of each community will affect the proper extent of the lease. The interests of the remainderman must also be considered by the trustee. When the remainderman is a descendant of the *cestui que trust*, and necessity requires it, the court might well approve a lease longer than the probable term of the trust. This, however, cannot be supported on the theory of implied power in the trustee, but only on the theory that equity, taking the place of the creator of the trust, will do what in all probability he would have done had he anticipated the emergency.⁶ Whether or not courts will adopt this *cy pres* doctrine, the trustee himself has no power to make such a lease.

⁹ *Bullock v. Bullock*, 52 N. J. Eq. 561.

¹ *Hefferman v. Taylor*, 15 Ont. 670.

² *Evans v. Jackson*, 6 L. J. Ch. 8.

³ *Bowers v. East London, etc., Co.*, Jac. 324.

⁴ *Fitzpatrick v. Waring*, L. R. Ir. 11 Ch. D. 35.

⁵ *Newcomb v. Kettell*, 19 Barb. (N. Y.) 608.

⁶ *Marsh v. Reed*, 184 Ill. 263.

Concerning the respective rights of the remainderman and the lessee when the trust terminates, the authorities are not in accord. Where the trustee leases for an unreasonable term, the excess only will be void in equity, according to the principle that where a lease under a power is executed for a longer term than is authorized by the power, it is void only for the excess.⁷ The excess will be void in equity, since the purchaser of a leasehold estate from a trustee is charged with constructive notice of the terms of the trust. But if the lease by a trustee is for a reasonable period, will the term drop if the trust comes to an end sooner than the term? The weight of authority seems to be that it will.⁸ Many such holdings are based on a statute⁹ whereby, when the trust ends, legal title passes forthwith from the trustee to the remainderman; for the courts argue that a trustee, like a tenant for life, cannot make a lease for years which will be valid after the termination of his estate. But whatever view be taken of a trustee's estate, whether the legal fee be determinable or absolute, there seems no reason to hold that, if he has an implied power to lease, the whole term is not valid. The validity should depend not on the extent of the trustee's legal estate, but on the extent of his power.¹⁰

WAIVER OF TRIAL BY JURY IN CRIMINAL CASES. — The apparent confusion on the question whether the issue of fact raised by a plea of not guilty may, with the consent of the parties, be tried by the court without a jury, seems to have arisen from the dicta of judges, who have propounded a doctrine of waiver of constitutional rights instead of construing the enacted law. It is believed that almost all the holdings in point may be reconciled by a scrutiny in each case of the constitutional and statutory provisions, and the grade of the offense. Where a constitution provides that there shall be no conviction except by verdict of a jury, the court alone cannot have jurisdiction of the issue,¹ and a statute permitting waiver of jury would seem invalid;² even minor offenses may have been within the intent of the enacting convention.³ But most of the state constitutions merely declare that the right of trial by jury shall remain inviolate, or that the accused shall enjoy the right to a trial by jury, and under such provisions the courts have almost universally upheld statutes permitting waiver,⁴ even in cases of felony.⁵ In the absence of such statutes, however, the law of criminal procedure must be derived from the common law, and since at common law trial by jury prevailed exclusively, trial by the court is unauthorized and invalid.⁶ A more common but much less sound explanation is that public policy, as dictated by the constitution, forbids waiver.⁷ Neither of the

⁷ *Pawcy v. Bowen*, 1 Ch. Cas. 23.

⁸ *Gomez v. Gomez*, 147 N. Y. 195; *Hutcheson v. Hodnett*, 115 Ga. 990.

⁹ N. Y. Laws, 1896, c. 547, § 89.

¹⁰ *Cf.* Sugden, Powers, 722.

¹ *State v. Holt*, 90 N. C. 749.

² *State v. Cottrill*, 31 W. Va. 162. *Contra*, *State v. Griggs*, 34 W. Va. 78.

³ See *State v. Stewart*, 89 N. C. 563.

⁴ *Edwards v. State*, 45 N. J. L. 419. *Contra*, *Brimingstool v. People*, 1 Mich. N. P. 260.

⁵ *Murphy v. State*, 97 Ind. 579; *State v. Worden*, 46 Conn. 349.

⁶ See *Harris v. People*, 128 Ill. 585. *Contra*, *Wren v. State*, 70 Ala.

⁷ *Cf.* *Cançemi v. People*, 18 N. Y. 128.

arguments against waiver applies, however, to offenses of the sort which, at the time of the adoption of the constitution, were dealt with summarily by justices of the peace, or by courts of special sessions.⁸ For these minor offenses, not being formerly triable by a jury, are usually considered not to have been intended to be within the constitutional guaranty,⁹ and hence not to be within the scope of the alleged constitutional policy against waiver;¹⁰ and there is sufficient precedent to give a court authorization in such cases to be the sole tribunal.

Moreover, a statute which provides that issues of fact shall be tried by a jury is held, in a recent case in a jurisdiction where the provisions of the Constitution of the United States apply, to prohibit waiver of jury. *In re McQuown*, 91 Pac. 689 (Okl.). Where there is such a statute there can be no other tribunal even for minor offenses unless further provision is made.¹¹ Without such statute the two sections of the Constitution involved,¹² construed together, have the force, not of those state constitutions which prescribe the exclusive use of trial by jury, but of those which merely protect the right to such trial.¹³ Consequently a federal statute permitting waiver is constitutional;¹⁴ and in a federal court, without such statute, a jury may be waived in the trial of a minor offence.¹⁵

The sole legal question, then, is always one of construction, not of policy. From the point of view of public policy, it may be said that waiver of jury trial conduces to efficient and expeditious criminal administration; but on the other hand, it endangers the existence of the jury system. A plea of guilty, not raising an issue to be tried, does not waive the right of trial by jury.¹⁶ Nor are the above considerations applicable to the question whether a defendant may elect to be tried by a jury consisting of other than twelve men; a statute permitting waiver of the whole jury does not permit waiver of one juror.¹⁷

RECENT CASES.

BANKRUPTCY—EXEMPTIONS—CLAIM OF EXEMPTION OUT OF PROCEEDS OF SALE.—A bankrupt absconded leaving no property except a quantity of liquor. His wife waived her right to claim \$500 worth of the liquor as exempt, but claimed in lieu thereof \$500 from the proceeds of its sale. Her reason was that if she sold the liquor she would have to pay a tax which would reduce the value of her exemption to less than \$200. *Held*, that she has a right to claim \$500 from the proceeds. *In re Luby*, 155 Fed. 659 (Dist. Ct., S. D. Oh., E. D.).

By the great weight of authority statutes of exemption should be liberally construed. *Y. C. N. Bank v. Carpenter*, 119 N. Y. 550; *In re McManus*, 87 Cal. 292. Where a bankrupt makes an assignment for the benefit of creditors with a reservation of exemptions from the proceeds of the property assigned, the assignment is generally held not to be void as a fraud on the creditors. *Banking Co. v. Whitaker*, 110 N. C. 345; *contra*, *King v. Ruble*, 54 Ark. 418. Fur-

⁸ *City of St. Charles v. Hackman*, 133 Mo. 634. *Contra*, *State v. Maine*, 27 Conn. 281.

⁹ *Murphy v. People*, 2 Cow. (N. Y.) 815.

¹⁰ *Schick v. United States*, 195 U. S. 65. But see dissenting opinion.

¹¹ *Bond v. State*, 17 Ark. 200. But see *People v. Smith*, 9 Mich. 193.

¹² Art. III, § 2; Amend. VI.

¹³ *Belt v. United States*, 4 D. C. App. Cas. 25.

¹⁴ *West v. Gammon*, 98 Fed. 426.

¹⁵ *Brown v. State*, 16 Ind. 496. *Contra*, *State v. Wells*, 69 Kan. 792. Cf. 9 HARV. L. REV. 335.

ther, it has been held that where there is a lien on the debtor's property, the property may be sold and exemptions claimed from the proceeds after payment of the lien debt. *Darby v. Rouse*, 75 Md. 26. The former line of decisions shows that the courts are not averse to allowing a claim of exemptions out of proceeds. The reason for the decision in the latter line of cases is that unless the debtor can claim from the proceeds, his right to exemptions will be defeated. The court applied the same reasoning to the present case, and to keep the wife's exemptions from being substantially defeated, allowed her to claim from the proceeds. In view of the very liberal construction almost universally given to exemption statutes the result seems correct.

BANKRUPTCY — STATE INSOLVENCY LAWS — MERGER OF CLAIM IN SUBSEQUENT JUDGMENT. — The Massachusetts court, under statutory power, instituted receivership proceedings against the defendant corporation to close its affairs. Thereafter, in another court, the petitioners carried to judgment against the defendant a debt action commenced prior to the receivership. The petitioners then sought to enforce their claim in the receivership proceedings. *Held*, that the petitioners may prove their original claim only. *Atty.-Gen. v. Supreme Council A. L. H.*, 81 N. E. 966 (Mass.).

In Massachusetts claims arising after the institution of insolvency proceedings are not provable against the insolvent's estate. MASS. REV. LAWS, c. 163, § 31. Under this heading courts in Massachusetts and Maine, in proceedings under their state insolvency laws, ordinarily include claims which, though valid when insolvency proceedings are commenced, are thereafter pursued to judgment. *Sampson v. Clark*, 2 Cush. (Mass.) 173; *Emery, Appellant*, 89 Me. 544. The courts reason that the original claim merges completely in the judgment debt, and that the creditor elects this judgment right against his debtor's future assets in place of the former claim against the insolvent estate. The court excepts the present case from this doctrine because here, the debtor corporation being dissolved, the creditor cannot be said to seek future assets. While the result reached is just, the court in considering the creditor's intent fails to dispose satisfactorily of the merger question, the opinion herein reflecting a recent tendency to curtail or ignore that technical theory. *Murphy v. Manning*, 134 Mass. 488. The merger doctrine is not applied in proceedings under the National Bankruptcy Act. *Boynton v. Ball*, 121 U. S. 457. The result is the application of different rules to state and federal insolvency proceedings in Maine and Massachusetts. This inconsistency is apparently confined to these two states. See *In re Stansfeld*, 4 Sawy. (U. S.) 334; *Imlay v. Carpentier*, 14 Cal. 173.

BILLS AND NOTES — FICTITIOUS PAYEE — EFFECT OF DRAWER'S INTENTION. — The plaintiff, on the fraudulent representation of A and to pay for shares of stock alleged to be for sale by B, drew a check payable to the order of B, who was ignorant of the transaction and had no such stock. A then indorsed the check, using the payee's name, to the defendant bank, a *bona fide* purchaser for value. The defendant collected the amount from the plaintiff's bank, which amount the plaintiff seeks to recover. *Held*, that the defendant is not entitled to the proceeds of the check. *Macbeth v. North and South Wales Bank*, 24 T. L. R. 5 (Eng., Ct. App., Oct. 16, 1907).

The Bills of Exchange Act, 1882, s. 7, subs. 3, provides that "where the payee is a fictitious or non-existing person, the bill may be treated as payable to bearer." In the United States the intention or knowledge of the drawer is decisive of the fictitiousness of a named payee, irrespective of the actual existence of a person of such name. *Shipman v. State Bank*, 126 N. Y. 318; *Armstrong v. Pomeroy Nat'l Bank*, 46 Oh. St. 512. The English courts, by a strict construction, consider the drawer's intention immaterial if the named payee is, in fact, non-existing. *Clutton v. Attenborough*, [1897] A. C. 90; see 10 HARV. L. REV. 449. If, however, the drawer intends payment to be made to an actual person, though unknown to the latter, as in the present case, the check is not payable to bearer and the drawer can recover for payment contrary to direction. *Vinden v. Hughes*, [1905] 1 K. B. 795. This is clearly correct.

A person actually existing and intended by the drawer to be the real payee can scarcely be considered fictitious. Therefore by no construction of the Act is the check payable to bearer. Since, then, a forged indorsement passes no title, the defendant, however innocent, is not entitled to the proceeds of the check. *Roberts v. Tucker*, 16 Q. B. 560; *Citizen's, etc., Bank v. Importer's, etc., Bank*, 119 N. Y. 195.

BILLS OF PEACE — BILL TO AVOID NUMEROUS ACTIONS OF EJECTMENT. — The plaintiff alleged that the eighty-four defendants, squatters on his land, were preparing to defend ejectment suits brought by him, all claiming to hold under M and to tack their adverse possession to his, in order to make it extend for the statutory period of limitation. The plaintiff further alleged that M had not been in adverse possession, that he had won an ejectment suit against one making a similar claim, and prayed that he be decreed entitled to immediate possession, and that the defendants account for rents and damages. The defendants demurred. *Held*, that the demurrer be sustained. Two judges dissented. *Illinois Steel Co. v. Schroeder*, 113 N. W. 51 (Wis.). See NOTES, p. 208.

CONFLICT OF LAWS — REMEDIES — REDRESS IN ONE JURISDICTION FOR TORT COMMITTED IN ANOTHER. — A Nevada statute gives a right of action for personal injuries caused by negligence or wrongful act, but provides that such liability shall exist only in so far as it shall be ascertained by a state or federal court in Nevada. The plaintiff sued in a federal court in Utah for an injury received in Nevada. *Held*, that redress can be given only by a court in Nevada. *Coyne v. Southern Pacific Co.*, 155 Fed. 683 (Circ. Ct., Dist. Utah). See NOTES, p. 207.

CONSTITUTIONAL LAW — IMPAIRMENT OF OBLIGATION OF CONTRACTS — CONTRACT ARISING FROM DEALINGS BETWEEN STATE AND FOREIGN CORPORATIONS. — By various enactments Alabama induced foreign railroad corporations, including the complainant, to acquire in the state franchises and other large property interests. Later a statute made recourse by foreign corporations to the federal courts *ipso facto* a forfeiture of their right to do business in the state. *Held*, that the defendants are enjoined from interfering with the prosecution of intra-state business by the complainant. *Seaboard Air Line Ry. Co. v. Railroad Commission of Alabama*, 155 Fed. 792 (Circ. Ct., M. D. Ala.).

Except under special circumstances, a state may compel a foreign corporation not to resort to the federal courts or else to leave the state. *Security Mutual Life Ins. Co. v. Prewitt*, 202 U. S. 246. There seems to be no reason, however, why the state may not bargain this right away, since it cannot strictly be called an exercise of the police power. A binding contract may arise between a state and a foreign corporation, based on their dealings, although no particular document embodies that contract. *Stearns v. Minnesota*, 179 U. S. 223. In the case under discussion the facts are strongly in favor of such a construction—that the dealings between the parties have “ripened into a legislative contract.” In every case the question is one of fact. See 20 HARV. L. REV. 405.

CONSTITUTIONAL LAW — SEPARATION OF POWERS — DELEGATION OF LEGISLATIVE POWER TO COMMISSIONS. — A statute provided that the state railroad commission should have power in its discretion to permit increase in the capital stock of railroad corporations, and to prescribe the terms upon which such increase should be made. *Held*, that the statute delegates legislative power and therefore is void. *State v. Great Northern Ry. Co.*, 100 Minn. 445. See NOTES, p. 205.

CONSTITUTIONAL LAW — SEPARATION OF POWERS — DELEGATION OF LEGISLATIVE POWER TO COMMITTEE OF POLITICAL PARTY. — A statute gave county central committees of the various political parties power to establish districts for the choice of delegates. *Held*, that the statute is unconstitutional. *Rouse v. Thompson*, 81 N. E. 1109 (Ill.).

It is assumed by the court and supported by authority that such a function

is ministerial and can therefore be delegated. *Kennedy v. Mayor of Pawtucket*, 24 R. I. 461; *Allison v. Corker*, 67 N. J. L. 596. The unconstitutional element found is that the recipients of the power are not public officers. But when authority to settle disputes as to who is the regular party nominee has been given to party officials, the delegation of power is constitutional, and the decision of the officials designated is final. *State v. Hauser*, 122 Wis. 534. And the appointment of state examining boards may also be delegated to voluntary associations. *Ex parte Gerino*, 143 Cal. 412. It seems impossible to reconcile the present case with these decisions. Furthermore, it is settled that when certain ministerial functions under primary laws have been entrusted to the officers of a political party, *mandamus* will issue to compel them to act. *State v. Jones*, 74 Oh. St. 418. Since the power of appointment can legally be delegated, and since the county central committees can be compelled to act, they are, in effect, constituted public officers by the very statute in question, and the reasoning of the court fails.

CONSTITUTIONAL LAW—SEPARATION OF POWERS—JUDICIAL RECOUNT AND RE-CANVASS OF BALLOTS.—The constitution of New York provides that "all laws regulating or affecting boards of officers charged with the duty of . . . counting votes at elections, shall secure equal representation of the political parties," and also that "the trial by jury in all cases in which it has been heretofore used shall remain inviolate forever." A statute provided that upon petition of any candidate for a certain office, the supreme court must proceed to a summary canvass of the vote at a certain election. A commissioner was to submit all disputed ballots to the court, which should pass upon each and, in conclusion, issue an order which should supersede the returns of the election officers. *Held*, that the statute either creates a board to recount the ballots, and therefore is unconstitutional because the board is not of the bi-partisan character required, or provides for a judicial determination of the title to an office, and is unconstitutional because of the failure to provide for a jury trial. *Mets v. Maddox*, 32 N. Y. L. J. 801 (N. Y. Ct. App. Nov. 19, 1907).

For a discussion of the power of the legislature to impose non-judicial duties upon the courts, suggested by the decision of this case in the lower court, see 21 HARV. L. REV. 138.

CONSTITUTIONAL LAW—TRIAL BY JURY—WAIVER IN CRIMINAL CASES.—In a prosecution for violation of the game laws, the defendant pleaded not guilty, waived a jury, and the case was tried by the court. A statute provided that issues of fact must be tried by a jury. *Held*, that judgment of conviction is void. *In re McQuown*, 91 Pac. 689 (Okl.). See NOTES, p. 212.

CONSTITUTIONAL LAW—WHO MAY SET UP UNCONSTITUTIONALITY—CORPORATION BARRED BY ACCEPTING STATUTE WITH CHARTER.—Massachusetts enacted a statute whereby all street railroads were required to transport children to and from public schools at half the regular fare. Later the appellant was incorporated in Massachusetts, its charter subjecting it to all the duties set forth in all general laws relating to street railway companies. The appellant was convicted for not carrying such children at half fare. *Held*, that it may not contest the constitutionality of the statute. *Interstate Consolidated St. Ry. Co. v. Massachusetts*, U. S. Sup. Ct., Nov. 4, 1907.

It is clearly settled that a state may fix the terms upon which it will allow the use of the corporate franchise. The court seeks to determine the terms agreed upon, because to these the corporation cannot later object. *Chicago, etc., Ry. v. Zernecke*, 183 U. S. 582. An express reference to statutes would seem sufficient to incorporate them as terms of the charter, and indeed some courts have considered all existing statutes to be so incorporated without reference. *Alabama, etc., Ry. v. Odeneal*, 73 Miss. 34; *cf. Park Bank v. Remsen*, 158 U. S. 337. But though it is granted that the corporation has accepted the obligations of all laws of a class, still it would seem that it could show that something on the statute-books was unconstitutional, and therefore not a law. Consequently the court must construe the terms to be that the corporation accepts everything

purporting to be a law of that class. When we incorporate these statutes in the charter, the case is brought within the wider doctrine that a person, natural or artificial, is estopped from setting up the unconstitutionality of a statute, after availing himself of its provisions. *Mayor v. Manhattan Ry.*, 143 N. Y. 1; see 21 HARV. L. REV. 133.

CONTRACTS — CONSTRUCTION — EXCEPTION OF HOLIDAYS FROM TIME ALLOWED BY CHARTER-PARTY FOR LOADING VESSEL. — By the terms of a charter-party the plaintiffs were to load the defendant's vessel "in seven weather working days (Sundays and holidays excepted)." For every day saved the plaintiffs were to be paid dispatch money; for every day in excess they were to pay demurrage. They loaded the vessel in seven days, the work being continued through two holidays, and sued for dispatch money for the two days saved. *Held*, that the plaintiffs cannot recover. *Nelson & Sons, Ltd., v. Nelson Line, Liverpool, Ltd.*, [1907] 2 K. B. 705.

The court bases its decision on the theory that, although by the terms of the charter-party holidays would not count whether work was done on them or not, an agreement should be inferred that those holidays on which work was done were to count as working days. For this the court has the authority of two recent English decisions. *Whittall & Co. v. Rahtken's Shipping Co.*, [1907] 1 K. B. 783; *Branchelow S. S. Co. v. Lamport & Holt*, [1907] 1 K. B. 787; but see *Houlder v. Weir*, [1905] 2 K. B. 267. No American decision on the point has been found. Granting that some agreement may be implied, since the work could be done only with the acquiescence and assistance of the defendants, the court seems to have made inferences unwarranted in the absence of evidence. By the terms implied the defendants are not only enabled to dispatch their vessel two days ahead of contract time, but they secure this benefit without paying dispatch money; whereas the plaintiffs get no added benefit, and their liability for demurrage accrues two days earlier than it otherwise would. The implication of the court seems not only unwarranted, but unfair to the plaintiffs.

CORPORATIONS — DIRECTORS — DIRECTOR'S RIGHT TO SALARY WHEN QUALIFYING WITH SHARES HELD IN TRUST. — Corporation A purchased stock in corporation B and transferred it to X, a director of A, who made a declaration of trust in favor of A. X was thereafter elected a director in B, which required each director to be a shareholder. It appeared on the records of A that the stock transfer was made to enable X to become a director in B "to represent the interests of this company." *Held*, that the A company cannot recover the salary received by X from the B company. *In re Dover Coalfield Extension, Ltd.*, [1907] 2 Ch. 76.

It is undisputed that the proceeds of a trust *res* are held in trust. The question here is whether X's salary is proceeds resulting from the qualifying shares. It has been held, under a statute deferring payment of money due members of a corporation as members, that a director comes in as an ordinary creditor, although he is required to be a shareholder. *Ex parte Beckwith*, [1898] 1 Ch. 324. It would therefore follow that such salary is received as compensation for services rendered, and not as profits on the shares. Indeed, were it otherwise, it is difficult to see why any subsequent holder of such shares should not be entitled to similar profits. If it were X's duty as director in A to become a director in B, his salary might belong to A, but where as here a director is rendering service outside the course of his duty, he is entitled to compensation. *Rogers v. Hastings, etc., Co.*, 22 Minn. 25. Moreover it may be argued that X became a director in B to advance the interests of A rather than those of B, and therefore, since X and A are both fraudulent, equity will not assist either.

CRIMINAL LAW — PROCEDURE — NECESSITY FOR PLEA. — The record of the defendant's conviction for a felony showed that he was arraigned and entered a demurrer, which was overruled, whereupon he was tried and convicted. It did not show affirmatively that a plea had been entered by or for the defendant. There was the usual statute providing that convictions should not be set

aside for mere technical errors except where such errors actually tend to prejudice the defendant's rights. *Held*, that this omission is ground for a new trial. *State v. Walton*, 91 Pac. 490 (Ore.).

Decisions in accord rest on the ground that the record in criminal cases must show affirmatively that every step essential to a valid trial has been properly taken, and that it is essential that a plea be entered, since otherwise there would be no issue for the jury to try and hence no valid trial. *Crain v. United States*, 162 U. S. 625. But it has been held that the omission of a formal plea is not a fatal error when the defendant consented or acquiesced in proceeding to a trial on the merits, for no substantial right of the defendant is violated, since the state is put to the whole of the proof, just as if a plea of not guilty had been entered. *Martin v. Territory*, 14 Okl. 598. It has also been held that even if a plea is essential to a valid trial, it is sufficiently shown when it may be clearly and necessarily inferred from the whole record that a plea was entered. *Rex v. Fowler*, 4 B. & Ald. 273. The weight of authority, however, especially since the decision of the United States Supreme Court cited above, is decidedly in accord with the present case.

DECEIT—GENERAL REQUISITES AND DEFENSES—PROVISION IN CONTRACT FOR VERIFICATION.—In an action for deceit the lower court ruled that a clause in a contract providing that the plaintiff should verify the defendant's plans precluded the plaintiff from asserting that he had been induced to act by the defendant's representations. *Held*, that the provision does not as a matter of law bar the plaintiff's recovery, but that whether or not the plaintiff acted in reliance on the plans is a question for the jury. *Pearson & Son, Ltd. v. Lord Mayor, etc., of Dublin*, [1907] A. C. 351.

It has been held that where a contract is conditioned on the verification of the defendant's statement by an expert, and the plaintiff acts without such verification, his action for deceit is not necessarily barred. *Blacknall v. Rowland*, 108 N. C. 554. The exact question involved in the present case seems not to have been considered elsewhere. The case, however, is analogous to cases where the plaintiff in an action for deceit negligently failed to investigate the truth of the defendant's statements. Whether such negligence should bar the action is not settled. The better view, however, is that since the action is for a wilful tort, the plaintiff though negligent should recover. *Speed v. Hollingsworth*, 54 Kan. 436; *contra*, *Poland v. Brownell*, 131 Mass. 138; see 17 HARV. L. REV. 421. In a case like the one under discussion, moreover, the plaintiff should not be without redress if the provision requiring verification was inserted to induce a belief that investigation was not necessary. See *Blacknall v. Rowland*, *supra*. The present case is sound, therefore, in holding that such a provision does not preclude the plaintiff's proof of reliance on the defendant's representations.

EMINENT DOMAIN—COMPENSATION—RIGHTS OF EXECUTORY DEVISEE.—Land which had been devised to A in fee, subject to an executory devise over in favor of B if A died without issue living at her death, was taken by eminent domain. B sought to have the compensation secured to him in case the executory devise took effect. *Held*, that B has no rights in the fund. *Fifer v. Allen*, 81 N. E. 1105 (Ill.).

An executory devise is in many respects analogous to the inchoate right of dower. Neither is certain to vest, but neither can be destroyed. The vesting of either gives a complete legal estate. Most courts have long since overridden the technical objection that inchoate dower is a mere contingent right, and allow the wife rights in the compensation given under eminent domain. *Wheeler v. Kirtland*, 27 N. J. Eq. 534; *contra*, *Kauffman v. Peacock*, 115 Ill. 212; see 20 HARV. L. REV. 407. The value of her interest can be determined by mortality tables, but before their use became general the husband was ordered to secure one-third of the proceeds to her in case she survived, or else to put that share in trust until the death of one of them. *Crangle v. Borough of Harrisburg*, 1 Pa. St. 132. Although the present case has never arisen before, there seems to be no reason to deny the executory devisee similar relief. It is not against

public policy to tie up the money, for the claimant's right arises, if at all, upon a contingency which can happen only within the limits set by the Rule against Perpetuities.

EXECUTION — EXEMPTIONS — RIGHT OF EXEMPTION OF DEBTOR FRAUDULENTLY REMOVING GOODS. — A debtor, to avoid payment of a debt, removed part of his property to Kentucky, leaving in Tennessee no more than was by statute exempt from execution. The value of the property removed equalled the amount of the statutory exemption. *Held*, that the debtor is not entitled to claim as exempt the property remaining in Tennessee. *Rogers v. Ayers*, 104 S. W. 521 (Tenn.).

It has been held that a fraudulent conveyance or concealment of property by a debtor works a forfeiture of his right of exemption. *Kreider's Estate*, 135 Pa. St. 578. The language of these exemption statutes, however, does not discriminate against dishonest debtors. Moreover, the exemption is created for the benefit of the family as well as for the encouragement of improvident debtors; hence the better view, and that sustained by the weight of authority, is that a debtor does not lose his right of exemption because of a fraudulent conveyance or concealment. *Duvall v. Rollins*, 71 N. C. 221. Some states go so far as to hold that such disposition does not affect the right of the debtor to select his exemption. *Megehe v. Draper*, 21 Mo. 510. But to allow a debtor to select as exempt property which has been levied upon, while he conceals or removes the rest, would be to allow him a larger benefit than the statutes contemplate; hence many jurisdictions, agreeing with the present case, hold that the fraudulent concealment or removal of property is a selection *pro tanto* by the debtor of such property as his exemption. *Hoover v. Haslage*, 5 Oh. N. P. 90.

GARNISHMENT — PROPERTY SUBJECT TO GARNISHMENT — GARNISHMENT OF OBLIGATION WITHOUT JURISDICTION OVER OBLIGEE. — A life insurance policy issued by a foreign corporation transacting business in New York in favor of non-resident beneficiaries was assigned to a New York creditor as security for advances. The insurance being due, the creditor garnished the insurance company in New York. The beneficiaries were served by publication. *Held*, that the garnishment is valid. *Morgan v. Mutual Benefit Life Ins. Co.*, 119 N. Y. App. Div. 645.

The action of garnishment is in the nature of an action *in rem* based on the fact that the garnishee has possession of property belonging to the principal defendant. When this property is tangible it may of course be garnished where it is situated. *Cooper v. Reynolds*, 10 Wall. (U. S.) 308. When it is intangible, like a debt, it would seem necessary for the court to have jurisdiction over the principal defendant in order to deprive him of his personal claim against the garnishee-debtor. But garnishment is allowed wherever the debtor may be sued. *Harris v. Balk*, 198 U. S. 215; see 19 HARV. L. REV. 132. A foreign corporation consents to be sued in whatever state it does business. *St. Clair v. Cox*, 106 U. S. 350. Thus the present case illustrates how an insurance company may be garnished on the same insurance claim in any state in the Union, irrespective of the court's having jurisdiction over the principal defendant. Indeed, any obligee of a corporation is subject to be deprived of his claim in a remote jurisdiction without opportunity to defend. While this decision may be a logical application of the principles enunciated by the Supreme Court, it seems in conflict with a previous New York decision. *Douglass v. Phenix Ins. Co.*, 138 N. Y. 209.

HABEAS CORPUS — EFFECT OF ESCAPE AFTER SERVICE OF WRIT. — After issue of a writ of *habeas corpus* and pending the argument, the relator escaped. He later surrendered to the sheriff and renewed his motion for discharge from custody. *Held*, that he has no right to a discharge under this writ. *Re Bartels*, 10 Ont. W. Rep. 553.

The remedy of *habeas corpus* is intended to facilitate the release of persons actually detained in unlawful custody. See *Barnardo v. Ford*, [1892] A. C. 326,

333. If the relator is released from custody before service, the writ should, of course, be quashed. *Commonwealth v. Chandler*, 11 Mass. 83; *Barnardo v. Ford*, *supra*. But it has been held that a release of the relator on bail after service will not oust the court of its jurisdiction to make a final order. *Pomeroy v. Lappeus*, 9 Ore. 363. And similarly where the respondent made a motion for a continuance on the ground that the relator had escaped, the court refused the motion and proceeded to final judgment. *Ex parte Coupland*, 26 Tex. 386. On the other hand, it has been held, in accord with the present case, that although the relator escaped after service, the writ should be dismissed. *Hamilton v. Flowers*, 57 Miss. 14. And on principle it would seem that when it appeared that the relator was no longer detained, since the very purpose of the writ, the termination of his detention, was shown to have been accomplished, it should have been quashed. The subsequent surrender and confinement constitute a new detention for which a new writ should issue.

HABEAS CORPUS — JURISDICTION OF COURTS — FEDERAL AND STATE COURTS. — A federal circuit court on the petition of a railway corporation granted an interlocutory injunction against the North Carolina railway commissioners, etc., pending an inquiry under the direction of the court as to the constitutionality of a state act defining maximum railway rates. It enjoined them from enforcing these rates and from prosecuting the company or its employees for failure to obey the statute. *Southern Ry. Co. v. McNeill*, 155 Fed. 756 (Circ. Ct., E. D. N. C.). Notwithstanding the circuit court had taken jurisdiction, an inferior state court convicted an employee of the company for failure to comply with the act. He applied to the circuit court for discharge on a writ of *habeas corpus*. *Held*, that the petitioner be discharged. *Ex parte Wood*, 155 Fed. 190 (Circ. Ct., W. D. N. C.). See NOTES, p. 204.

INJUNCTIONS — NATURE AND SCOPE OF REMEDY — BINDING PERSON WITHOUT NOTICE. — An injunction was issued enjoining A, his agents, successors, assigns, and all persons whomsoever, from maintaining a liquor nuisance on certain land. The defendant subsequently purchased the land and violated the order. It was not shown that he had knowledge of the injunction. *Held*, that the defendant is guilty of contempt. *State v. Porter*, 91 Pac. 1073 (Kan.).

On principle strangers to the suit should not properly be included in an injunction, since their rights have not been adequately represented. *Cf. Boyd v. State*, 19 Neb. 128; 17 HARV. L. REV. 486. But where an injunction binds the defendant, his abettors, etc., all such persons are held in contempt if they knowingly violate the decree. *Fowler v. Beckman*, 66 N. H. 424. And even persons acting independently have been held guilty of contempt for doing an act, knowing it was enjoined. *Chisolm v. Caines*, 121 Fed. 397. The court argued in the present case that the decree created a restriction on the land binding against subsequent owners. Even this would not justify the punishment of a person who had no knowledge of the injunction, for no one can be culpable in disregarding an order of which he was ignorant. *State v. Lavery*, 31 Ore. 77. It is fallacious to argue that if the defendant escapes punishment the injunction becomes a nullity on a change of ownership in the land, for the party originally enjoined may be in contempt by procuring a violation. *Poertner v. Russel*, 33 Wis. 193. There seems to be no justification for the conclusion that the defendant is in contempt.

INJUNCTIONS — NATURE AND SCOPE OF REMEDY — PERPETUAL INJUNCTION AFTER LONG POSSESSION. — A township road had been travelled continuously for a longer period than that required by the statute of limitations, but it was not altogether clear that the road did not wrongfully encroach on the defendant's land. *Held*, that in view of the town's long occupation, the defendant is perpetually enjoined from obstructing the road. *Williams v. Riley*, 113 N. W. 136 (Neb.).

When the right at law of one who seeks an injunction against a continuing trespass has not been clearly established, equity will usually deny him relief. *Washburn's Appeal*, 105 Pa. St. 480. A temporary injunction will be granted,

however, when irreparable injury is threatened. *Santee River, etc., Co. v. James*, 50 Fed. 360. Once the right at law is proved, irreparable injury is not essential to entitle a plaintiff to permanent relief. *D., L. & W. R. R. Co. v. Breckenridge*, 57 N. J. Eq. 154. Further, even without proof of irreparable injury, relief has been given when the plaintiff showed merely a strong *prima facie* title. *McArthur v. Matthewson*, 67 Ga. 134. But the wisdom of making the injunction perpetual when the title is honestly contested and falls short of being absolutely proved is doubtful. In effect the court has held that, since the defendant probably has no title, it is proper to treat him as having none whatsoever — a limitation on his legal rights not warranted by the merits or by any overbalancing requirement of expediency. To grant a perpetual injunction, however, is not unsupported where there has been long possession. See *Sanderlin v. Baxter*, 76 Va. 259.

JUDGMENTS — FOREIGN JUDGMENTS — EQUITABLE DECREE AS A CAUSE OF ACTION IN ANOTHER STATE. — In an action to quiet title the plaintiff relied on a foreign decree, rendered in divorce proceedings, which ordered the defendant to convey the land to the plaintiff. The plaintiff contends that the decree is conclusive of the rights of the parties, and that a deed to the second defendant, who had notice of the decree, was fraudulent and conveyed no title. *Held*, that the plaintiff has neither legal nor equitable title to the land, since the foreign court had no jurisdiction over the subject-matter. *Fall v. Fall*, 113 N. W. 175 (Neb.). See NOTES, p. 210.

MUNICIPAL CORPORATIONS — FRANCHISES AND LICENSES — PERMIT TO PRIVATE PERSONS TO OPERATE A SPUR TRACK. — The defendants, proprietors of a department store, obtained from the Board of Estimate and Apportionment of the city of New York a permit to construct a spur track from the adjoining street railway into their basement, and to run express cars over it during the night for the conveyance of goods. The plaintiff, an adjoining property owner, sought an injunction restraining the taking of any steps under such permit. *Held*, that the Board has no power to grant such a permit, and that the plaintiff is entitled to an injunction. *Hatfield v. Straus*, 189 N. Y. 208.

The courts are very strict in forbidding rights in city streets for any but public uses. *Gustafson v. Hamm*, 56 Minn. 334. The operation of a short spur track differs only in degree from the operation of a street railway of some length, and such railways, unless operated for public service, have been almost universally condemned by the courts as public nuisances. *Fanning v. Osborne*, 102 N. Y. 441; *contra*, *Truesdale v. Grape Sugar Co.*, 101 Ill. 561. And it would seem that the general interests of the city would not be sufficiently furthered to justify such permits on the ground of public policy. See *People v. B. & O. R. R. Co.*, 117 N. Y. 150. If the permit should be granted to the street railway company, it might be said that the right was secured solely for the benefit of the shipper and was an evasion to secure a private right. *Commonwealth v. City of Frankfort*, 92 Ky. 149. On the other hand, it has been argued that such a track was a necessary incident to the carriage of freight, and that not until another shipper was refused a similar connection with the main track could it be said that such a track was a private privilege. *P. C., etc., Ry. Co. v. City of Cincinnati*, 16 W'kly L. Bul. (Oh.) 367.

PARTNERSHIP — NATURE OF PARTNERSHIP — SITUS OF DECEASED PARTNER'S INTEREST. — Two partners residing in England carried on the business of sheep farming in New South Wales. On the death of one partner his share in the business was assessed for probate duty in New South Wales as an asset situated there. *Held*, that the assessment is valid. *Commissioner of Stamp Duties v. Salting*, [1907] A. C. 449.

On the death of a partner his representatives have merely a right of action for his interest in any surplus that may remain after an accounting and an adjustment of the partnership affairs. By the common law view this right of action is against the surviving partner, who has the title to all the firm assets. *Case v. Abeel*, 1 Paige (N. Y.) 393; see 14 HARV. L. REV. 145. By this view

the decision is wrong, for the English theory is that a chose in action is situated at the debtor's residence for purposes of probate duty; so the right against the surviving partner in England is an English asset. *In re Smyth*, [1898] 1 Ch. 89. But by the mercantile view the partnership assets are owned by the firm as an entity. *Hopkins v. Baker Bros. & Co.*, 78 Md. 363; *Pratt v. McGuinness*, 173 Mass. 170. The right of action is against this entity which is a New South Wales firm, as its business is in that country. *Laidlay v. Lord Advocate*, 15 App. Cas. 468. Hence the decision that the right is a New South Wales asset is in line with the modern authorities which, while not openly and courageously adopting the mercantile theory, reach results that can be justified on no other basis. See 57 Cent. L. J. 343; 17 HARV. L. REV. 207.

PARTY WALLS — COMPENSATION FOR USE IN THE ABSENCE OF AGREEMENT. — On enlarging his store, an owner of land built the exterior wall half on his own and half on the adjoining lot, without permission or agreement to divide the expense. Both lots were sold, and the vendee of the adjoining owner in building made use of that part of the wall which was on his land. *Held*, that the vendee of the builder of the wall can recover the value of the use made of the wall. *Spaulding v. Grundy*, 104 S. W. 293 (Ky.).

On facts similar to these, the builder of the wall has uniformly been denied the right to proportionate contribution to the cost of erection from the adjoining owner or his grantee, who makes use of the wall. *Preiss v. Parker*, 67 Ala. 500; *List v. Hornbrook*, 2 W. Va. 340. Recovery limited to the value of the use actually made has been sanctioned in only one case. See *Sanders v. Martin*, 2 Lea (Tenn.) 213; *contra*, *Sherred v. Cisco*, 4 Sandf. (N. Y.) 480. Whether the recovery be measured by the builder's outlay or by the value of the use of that which the adjoining owner never authorized to be put on his land, the latter is arbitrarily forced to pay for using part of his own land, in the alternative of suffering a diminution in its size or of adopting his remedy of self-help, which would cause needlessly great injury. *Wigford v. Gill*, Cro. Eliz. 269; see *Sherred v. Cisco*, *supra*, 489. Moreover, the builder of the wall is amply protected by estoppel, if it appear that he was reasonable in assuming a promise by the adjoining owner to pay if he used the wall. *Day v. Caton*, 119 Mass. 513. In the case discussed there appears to be no basis for such an assumption; consequently the result seems unwarranted.

POWERS — DEFECTIVE APPOINTMENT — WHEN EQUITY WILL REAPPOINT. — The testatrix bequeathed property to her husband to appoint "\$4,000 to my mother's family and the balance to my father's family in such manner as he thinks proper." The donee of the power appointed \$4,500 to the mother's family. *Held*, that the appointment is void and that the court cannot appoint the property. *In re Roger's Estate*, 67 Atl. 762 (Pa.).

Where the donee of the power is not required to exercise it, equity will make no appointment. See *Brown v. Higgs*, 8 Ves. Jr. 561. But in the present case it seems clear that no discretion was given. The court, while recognizing that the property is held in trust, calls it a trust for the donor. This seems erroneous, as the trust should be for the beneficiaries. See *Brown v. Higgs*, *supra*. Where the power is to be exercised for a definite class with no power of exclusion, and members of that class are excluded, equity distributes equally to the entire class. *Kemp v. Kemp*, 5 Ves. Jr. 849. Moreover, it is held that where the power is to be exercised for "relations" with power of exclusion, all the "relations" are *cestuis*, and, on a failure to exercise the power, the next of kin will take. *Harding v. Glyn*, 1 Atk. 469. Where there has been an attempt to appoint too much, as in the present case, it has been held that the last appointees lose their share. *Trollope v. Routledge*, 1 De G. & Sm. 662. This last decision was based on the intention of the donee. In the present case, however, since no preference seems intended, a *pro rata* distribution among the appointees seems desirable on the analogy of the abatement of legacies.

SALES — SALE OF GOODS ACT — EFFECT OF TENDER OF PAYMENT ON VERBAL AGREEMENT. — The plaintiff orally agreed to purchase goods exceed-

ing £10 in value and mailed the checks in payment in accordance with the terms of the agreement. The defendants returned the checks and refused to deliver the goods. *Held*, that there is no payment sufficient to render the contract enforceable under the Sale of Goods Act. *Davis v. Phillips, Mills & Co.*, 24 T. L. R. 4 (Eng., K. B. D., Oct. 15, 1907).

Payment by check on funds in a bank is sufficient to come within the similar requirement in § 17 of the statute of frauds. *Hunter v. Wetsell*, 84 N. Y. 549. But on the point of mere tender of payment, for the first time litigated in England, the court follows the settled American rule, that the seller may decline a tender, though made strictly according to the terms of the agreement, and that an acceptance of payment is necessary to take a verbal agreement out of the statute. *Hershey Lumber Co. v. St. Paul Sash Co.*, 66 Minn. 449; *Edgerton v. Hodge*, 41 Vt 676. It is contended that the Post Office was the authorized agent of the parties to accept payment. But the object of the statute was to require something to pass between the parties other than mere words, some act which would be strong evidence of their actual agreement. Such acceptance by the Post Office would occur in the absence of any agreement; consequently it has no force as evidence of an agreement, and is insufficient to render such an oral contract enforceable under the Act.

STATUTES — INTERPRETATION — EFFECT OF SPECIAL SAVING CLAUSE ON GENERAL SAVING STATUTE. — The defendant was indicted and convicted of paying rebates in violation of the first section of the Elkins Act, which had been superseded by the Hepburn Act. The offenses were committed prior to the enactment of the latter. The Hepburn Act expressly repeals all statutes or parts of statutes in conflict with its provisions. It contains an express saving clause mentioning only pending causes, but § 13 of the United States Revised Statutes provides that "the repeal of any statute shall not have the effect to release any penalty incurred under such statute unless the repealing act shall so expressly provide." *Held*, that the conviction is valid. *Great Northern Ry. v. United States*, 155 Fed. 945 (C. C. A., Eighth Circ.).

For a discussion of a previous decision reaching the same result, see 20 HARV. L. REV. 502.

TITLE OWNERSHIP AND POSSESSION — POSSESSION OF CONTENTS OF RECEPTACLE. — After seizure of his goods under a writ of *fiery facias* the judgment debtor, without the knowledge of the sheriff, placed a sum of money in a piece of the furniture seized. Shortly afterwards he died insolvent. The sheriff having exercised no control over the money, the official receiver claimed it for the estate. *Held*, that the receiver is entitled to the money. *Johnson v. Pickering*, 24 T. L. R. 1 (Eng., Ct. App., Oct. 14, 1907).

For a discussion of this case in the lower court, see 21 HARV. L. REV. 64.

TRUSTS — POWERS OF TRUSTEES — TRUSTEE'S RIGHT TO LEASE TRUST PROPERTY. — Trustees with express power to lease made a 99 year lease of trust property consisting of city lots. It was estimated that the lease would extend 28 years beyond the duration of the trust estate. By the terms of the agreement it was to be binding only after judicial sanction. *Held*, that in the absence of necessity therefor, the term is unreasonable, and judicial sanction will be refused. *In re Hubbell Trust*, 113 N. W. 512 (Ia.). See NOTES, p. 211.

WATERS AND WATERCOURSES — OWNERSHIP OF BED — POSITION OF STATE BOUNDARY LINE AFTER AVULSION. — The Mississippi River, which marked the boundary between Tennessee and Arkansas, in 1876 suddenly left its old channel and made a new cut-off across a neck of land. *Held*, that the boundary is not changed and the state owns the old bed to the line equidistant from the established banks. *State v. Muncie Pulp Co.*, 104 S. W. 437 (Tenn.).

By common law the soil of a river is *prima facie* in the Crown as far as the tide ebbs and flows. *Malcomson v. O'Dea*, 10 H. L. Cas. 591. But western states have in general followed the civil law in making the state's title to a river-

bed depend on the fact of navigability. *Goodwin v. Thompson*, 15 Lea (Tenn.) 209. In the absence of treaty or agreement the exact boundary between states is held, by the weight of authority, to be the "thread" of the stream, or the middle of the main navigable channel, on the principle that the right of each state to equality in the control of navigation demands an equality of ownership in that channel. *Iowa v. Illinois*, 147 U. S. 1. Arkansas, however, has held the boundary to be the line midway between the banks of the river. *Cessill v. State*, 40 Ark. 501. The decision of the present case on this point may be considered as an agreement by Tennessee to that line. On the other point the law is well settled in accord with the case, that an avulsion will leave the boundary as before, in the old bed. *Nebraska v. Iowa*, 143 U. S. 359.

BOOKS AND PERIODICALS.

I. LEADING LEGAL ARTICLES.

THE PRESENT INADEQUACY OF INTERSTATE RENDITION. — The late kidnapping of Haywood and others from Colorado and the legal contest ensuing therefrom suggest several questions in constitutional law and in interstate rendition, which are treated by Mr. C. P. McCarthy in a recent article. *A Constitutional Question Suggested by the Trial of William D. Haywood*, 19 Green Bag 636 (November, 1907). Haywood and the others, who were in Colorado, were charged in Idaho with being accessories before the fact while in Colorado to a murder committed in Idaho. Through connivance between the officials of the two states, they were kidnapped in Colorado by Idaho officials and carried into Idaho. They instituted *habeas corpus* proceedings to secure their release, but the United States Supreme Court decided against them.¹ Mr. McCarthy's initial assumption that this result is correct and established law is indisputable.² An offender against one state has no right of asylum in another. He is untouched there solely because the machinery of the offended state cannot reach him. Accordingly, when that difficulty is removed by his actual presence within the jurisdiction, there is no reason for not holding him. But the query is whether or not it is necessary to resort to this procedure which has so little to commend it to an orderly community. The author points out that in this situation there is no other way under our present laws whereby the outraged sovereignty can secure the offender to inflict punishment. The federal Constitution provides that any person who shall flee from justice shall be delivered up on demand of the state from which he fled. It is now entirely settled that for the demand to come within this provision, the party demanded must have been within the demanding state at the time the crime was committed.³ This was not the situation in the Haywood case, nor would it be in the many instances in which a party can commit a crime against a state without being physically within its territory. Mr. McCarthy then considers whether there is any way of meeting these situations.

A constitutional amendment would, of course, afford a remedy, but that is not now feasible. Until such amendment, congressional legislation covering the situation would be unconstitutional, as there is no warrant for federal action except in the case of fleeing criminals.⁴ State action remains as the only pos-

¹ *Pettibone v. Nichols*, 203 U. S. 192.

² He cites the leading cases in accord. There are only two *contra*. *State v. Simmons*, 39 Kan. 262; *In re Robinson*, 29 Neb. 135.

³ *Hyatt v. Corkran*, 188 U. S. 691.

⁴ It has been contended that in enacting the present statute Congress has exceeded its powers. *Matter of Romaine*, 23 Cal. 585. *Contra*, *Ex parte Morgan*, 20 Fed. 298, 303.

sible source of relief. It is not contended that the executive can without statutory authority remove persons from the state.⁶ But Mr. McCarthy believes that the states may legislate to produce this result. This opinion seems correct. It is disputed on the ground that, because interstate rendition depends upon the federal Constitution, no person can be surrendered unless the case falls within the constitutional provision.⁶ This is fallacious. To imprison or to remove from its territory such persons as it sees fit is unquestionably an inherent power of every sovereignty. Before the Constitution, or in the absence of any provision on the subject, each state in the exercise of its sovereignty could surrender criminals or refuse to do so at its discretion. It does not follow, then, that because the Constitution requires it to surrender them in some cases, it has lost its discretion in the remaining cases. Otherwise no effect would be given to the Tenth Amendment, which reserves to the states all power in local affairs not granted. Again, it is argued that the view contended for would be destructive of national homogeneity, as making possible agreements between some states to the exclusion of others.⁷ That argument would apply equally to any legislation conferring favors on outsiders. For example, some states have lent to outsiders their machinery to secure testimony from persons within their boundaries;⁸ but that practice has never been decried, nor has our national homogeneity disappeared. In short, statutes of this nature need not have the suggested effect—it is only possible that they may be so drawn as to have such effect. At least half of the dicta⁹ and the only decision¹⁰ found at all in point are with the view advocated. It is also supported by several analogies. Thus the Constitution does not require the states to hold fugitives from justice before demand is made, but still the states may do so.¹¹ And the states may provide the method of the arrest¹²—a fact which again shows that the states are not excluded from legislating on this subject.

RIGHTS ARISING FROM MISTAKE OF LAW.—It is well settled in both England and the United States that money paid under a mistake of fact can in general be recovered.¹ It is generally stated in the text-books that in neither country can there be a recovery of money paid under a mistake of law.² In a recent article Mr. Corry Montague Stadden maintains that there is in England at the present day, as well as in France and Germany, no difference between the two classes of cases. *Error of Law*, 7 Colum. L. Rev. 476 (November, 1907). Clearly until 1802, as Mr. Stadden points out, no distinction was made either in law or in equity. Lord Mansfield in 1786 said that the rule had always been that "if a man has actually paid down what the law would not have compelled him to pay, but what in equity and conscience he ought, he cannot recover it again; but where money is paid under a mistake, which there was no ground to claim in conscience, the party may recover it back again."³ But in 1802 in a case where the question was whether money paid under a mistake of law could be recovered, Lord Ellenborough, misled by counsel to think there was no authority for allowing a recovery in such a case, refused relief.⁴ Though, as

⁶ *Ex parte Morgan*, *supra*, 301.

⁶ *People v. Hyatt*, 172 N. Y. 176, 182.

⁷ *In re Kopel*, 148 Fed. 505, 506.

⁸ For example, N. Y. Code Civ. Proc., §§ 914-919.

⁹ See *State v. Hall*, 115 N. C. 811, 818; *Matter of Fetter*, 23 N. J. L. 311, 315.

¹⁰ *Matter of Romaine*, *supra*.

¹¹ *Commonwealth v. Tracy*, 5 Met. (Mass.) 536. See also *Knowlton's Case*, 5 Cr. L. Mag. 250, 254.

¹² *Ex parte Ammons*, 34 Oh. St. 518.

¹ See 14 HARV L. REV. 467.

² 9 Cyc. 403; Keener, *Quasi-Contracts*, 86.

³ *Hize v. Dickason*, 1 T. R. 285.

⁴ *Bilbie v. Lumley*, 2 East 469.

the author points out, in a later case ⁶ he changed his mind when the precedents were brought to his attention, his earlier decision was followed by Mr. Justice Gibbs in a case ⁶ which is generally said to have settled the law for England.

Various reasons have been given for refusing to allow recovery in these cases. (1) The maxim *ignorantia juris non excusat* is quoted as the basis of the doctrine. But the meaning of this maxim is that one who has done a wrong cannot excuse himself on account of his ignorance of the law — it applies to cases in which one has committed a crime, or a tort, or a breach of contractual or other obligation.⁷ In the cases under discussion the plaintiff has done no wrong; he is merely seeking that to which in conscience he is entitled. (2) It is said that every one is presumed to know the law. This is probably the same maxim put into terms of fiction. There is no such presumption in fact or in law.⁸ (3) It is said that there is no means of trying a man's knowledge of the law. But the existence of such knowledge is an issuable fact even in criminal cases where a specific intent is of the essence of the crime.⁹ (4) It is said that mistake of law would be urged in every case. The danger is equally great in the case of mistake of fact. But here, as in such cases, it should not be enough merely to allege mistake; the burden of proof should be on the plaintiff. (5) It is said that allowing a recovery would put a premium on ignorance. But this argument applies equally to mistake of fact. Besides, it is no great inducement to a man to pay money because he knows that if he can successfully prove a mistake he can get it back again. (6) Lastly, it is said that if a recovery is allowed litigation will be multiplied. This argument applies as strongly to cases of mistake of fact. Moreover, it is not the object of the law to prevent the litigation of just claims. On the whole it would seem that if there is a mistake either of fact or of law there should be a recovery unless there is a legal or moral obligation to pay, as in the case of a debt barred by the statute of limitations, or unless the defendant acts in such a way in reliance on the payment that the parties can no longer be put in *statu quo*.

Furthermore, aside from all arguments on principle, Mr. Stadden asserts, after making a pretty thorough analysis of the English cases, that in England the law has by degrees returned to the older view. It is true that it has been held that money paid under a mistake of law to an officer of the court may be recovered.¹⁰ And a distinction has been taken between mistake of private rights and of general law,¹¹ though Sir Frederick Pollock maintains that this distinction does not apply to cases of money paid.¹² But in spite of these encroachments and of one or two decisions¹³ and a few dicta¹⁴ to the effect that equity may give relief against mistake of law, the general rule does not appear to have been changed. There is no case where a recovery has been allowed of money paid under mistake of law, except when paid to an officer of the court. On the contrary the modern English cases, like those in this country, seem still to cling to the distinction between mistake of law and of fact.¹⁵

AUSTRALIAN CONSTITUTION, THE PRIVY COUNCIL AND THE *W. Harrison Moore*. Adversely criticizing a recent holding that the salary of an Australian officer is subject to taxation by Victoria. 23 L. Quar. Rev. 373. See 20 HARV. L. REV. 494.

⁶ Perrott v. Perrott, 14 East 423.

⁷ Briabane v. Dacres, 5 Taunt. 143.

⁸ Keener, Quasi-Contracts, 90.

⁹ Queen v. Mayor of Tewkesbury, L. R. 3 Q. B. 629.

¹⁰ Regina v. Twose, 14 Cox C. C. 327.

¹¹ Ex parte James, L. R. 9 Ch. 609.

¹² Cooper v. Phibbs, L. R. 2 H. L. 149.

¹³ Pollock, Contracts, 7 ed., 457.

¹⁴ Daniell v. Sinclair, 6 App. Cas. 457.

¹⁵ See Stone v. Godfrey, 5 De G. M. & G. 76; Rogers v. Ingham, L. R. 3 Ch. 351.

¹⁶ Midland, etc., Ry. v. Johnson, 6 H. L. Cas. 798; Eaglesfield v. Marquis of Londonderry, 4 Ch. D. 693; Henderson v. Folkestone W. W. Co., 1 T. L. R. 329.

- COMMON LAW JURISDICTION OF THE UNITED STATES COURTS, THE. *Allen B. Parker*. 17 Yale L. J. 1.
- CONSTITUTION AND THE CORPORATIONS, THE. *Charles F. Amidon*. Contending that the Constitution can and should be so interpreted as to allow federal control of corporations of national scope. 14 The Bar 19.
- CONSTITUTIONAL QUESTION SUGGESTED BY THE TRIAL OF WILLIAM D. HAYWOOD, A. *Charles P. McCarthy*. 19 Green Bag 636. See *supra*.
- CONTEMPT OF COURT, STATEMENTS BY ATTORNEYS IN ARGUMENTS, PLEADINGS, AND BRIEFS PERTAINING TO RULINGS AND DECISIONS, AS. *Sumner Kenner*. 65 Cent. L. J. 331.
- CONTRACTUAL OBLIGATIONS ATTACHING TO LAND. *W. Strachan*. 23 L. Quar. Rev. 432.
- CORPORATE DIRECTORS, LIABILITY OF. *Frederick Dwight*. Showing how lax the law is with directors who fail in their duties. 17 Yale L. J. 33. See 15 HARV. L. REV. 479.
- DAMAGES IN THE PUBLICIZATION OF BRIDGES. *Anon.* Discussing the proper measure of damages when a toll bridge is taken by eminent domain. 12 The Forum 37.
- DEBENTURE-HOLDERS AND EXECUTION CREDITORS. *Anon.* Collecting the recent English authorities. 29 L. Stud. J. 240.
- DIPLOMATIC PROTECTION OF CITIZENS ABROAD (Continued). *Gaston de Leval*. Suggesting a system to ensure protection. 42 L. J. 617.
- EIGHT-HOUR LAW WITH RESPECT TO GOVERNMENT CONTRACTS. *Anon.* Adversely criticizing a recent case holding the federal eight-hour law constitutional. 35 Nat. Corp. Rep. 301.
- EQUITY JURISDICTION, WORD "NOT" AS A TEST OF, TO ENJOIN A BREACH OF CONTRACT. *Henry Schofield*. Reviewing the authority on implied negative contracts and arguing that the distinction made in recent Illinois cases between express and implied contracts is not to be supported. 2 Ill. L. Rev. 217. See 19 HARV. L. REV. 476.
- ERROR OF LAW. *Corry Montague Stadden*. 7 Colum. L. Rev. 476. See *supra*.
- HAGUE CONFERENCE, THE LEGAL RESULTS OF THE. *Norman Bentwich*. Especially considering the possible adoption of an international prize court. 42 L. J. 664.
- INTERNATIONAL PRIZE COURT, AN. *Amos S. Hershey*. Discussing the advantages of such a court and the difficulties in the way of its establishment. 19 Green Bag 652.
- INTERSTATE COMMERCE, STATE INTERFERENCE WITH. *H. P. Burnett*. A careful analysis of the subject with citation of authority. 13 Va. L. Reg. 497.
- "JUDGE-MADE" LAW, A CENTURY OF. *William B. Hornblower*. 7 Colum. L. Rev. 453.
- JUDICIAL LIABILITY. *W. W. Lucas*. A clear statement of the English law on liability of judicial officers for negligence, *mala fides*, etc. 32 L. Mag. & Rev. 417.
- JUDICIARY, THE FUNCTION OF THE (Continued). *Percy Bordwell*. Arguing that the Supreme Court should not declare political laws unconstitutional. 7 Colum. L. Rev. 520.
- LETTERS, THE RIGHT TO USE. *Anon.* A general discussion based upon the authorities. 52 Sol. J. 5.
- MUNICIPAL SECURITIES, THE BETTER PROTECTION OF. Giving reports of two commissions recommending methods for further protection. 24 Bank. L. J. 785.
- NEGOTIABLE INSTRUMENTS ACT, THE NEW. *Julian W. Mack*. Pointing out the most recent changes in the Illinois Negotiable Instruments Law. 2 Ill. L. Rev. 265.
- NEGOTIABLE INSTRUMENTS ACT, THE NEW ILLINOIS. *Louis M. Greeley*. 2 Ill. L. Rev. 145.
- PARTIAL PERFORMANCE OF ENTIRE CONTRACTS, RIGHT OF RECOVERY FOR. *Graham B. Smedley*. A good collection of authority. 65 Cent. L. J. 292.
- STOCK, WATERED, AT COMMON LAW. *Wm. C. White*. Contending that stockholders who have received paid up stock without full payment, should be made liable only by legislation. 5 The Law 81, 103.
- TREATIES, EFFECT OF "MOST-FAVOURLED-NATION" CLAUSE IN COMMERCIAL. *Sir Thomas Barclay*. 17 Yale L. J. 26.
- WAIVER OF EXEMPTION FROM SERVICE OF PROCESS BY REASON OF ATTENDANCE UPON COURT BY NON-RESIDENT PARTY OR WITNESS. *Anon.* Enumerating the methods by which waiver may be made. 35 Nat. Corp. Rep. 304.
- YOUNG *v.* GROTE. *Thomas Beven*. Contending that the drawer of a check who negligently gives opportunity for raising it should be liable. 23 L. Quar. Rev. 390. See 25 HARV. L. REV. 139.

II. BOOK REVIEWS.

A CODE OF FEDERAL PROCEDURE. By Walter Malins Rose. In three volumes. San Francisco: Bancroft-Whitney Company. 1907. pp. xxx, 3186. 24cm.

In this work Mr. Rose has produced a book of unusual value to the practicing lawyer. The mere statement that more than six hundred closely printed pages in the third volume are devoted to approved forms relating to nearly every sort of procedure in the federal courts is sufficient to show the practical character of this treatise. The text itself, which occupies slightly more than one-half of the whole number of pages, presents the principles of federal practice in the form of a code, the greater number of the sections of which are quoted directly from the Constitution, the federal statutes, or the rules of court. Where, however, principles are found in the law which are stated only in the decisions, the author has summarized them in sections containing his own statement of the established rules. The sources of both the author's sections and those quoted from the Constitution, the statutes, or the court rules, are clearly indicated. The book contains very complete cross-references, and also tables of parallel references by means of which the sections of the code in which any section of the Revised Statutes or of the Statutes at Large is discussed may be readily found. The work also contains the Bankruptcy Act and the General Orders in Bankruptcy, the rules of the Supreme Court and of all the circuit courts of appeals, and the rules of the circuit courts of the more important jurisdictions. The whole is made readily accessible by an index of more than one hundred and thirty pages.

Ordinarily the treatment of a complicated subject within the somewhat rigid limits of a code is a task of the greatest difficulty. The rules of federal procedure, however, are so largely derived from positive enactments rather than from common-law principles or customary practice, that the subject lends itself to codification more readily than almost any other. One disadvantage of a treatise in code form is that the principles with which it deals must be stated in the form of established propositions, thus leaving less chance for a discussion of doubtful or disputed points. While this defect will be felt at times by the critical reader of Mr. Rose's work, it has been avoided for the most part by the use of full annotations. These annotations make up the greater part of the text of the book. They contain a complete exposition and discussion of the rules laid down in the various sections of the code, arranged in ordinary text-book form, with full references to the decisions upon which the notes are based. No doubt Mr. Rose's experience in collecting federal cases for his former works has been of great value to him in the preparation of these volumes. At any rate, the collection of cases seems to be very complete. The treatment of the various topics is clear and logically arranged. One may with some confidence express the hope that the work will meet with the cordial welcome from the profession which its merits warrant.

H. LEB. S.

THE PRINCIPLES AND FORMS OF PRACTICE. By Austin Abbott. Second Edition by Carlos C. Alden. In two volumes. New York: Baker, Voorhis and Company. 1907. pp. xiv, 1170; xi, 1171-2317. 8vo.

Outside of the code itself no book is used more by the practicing attorney in New York than Abbott's *Practice and Forms*. A new edition of this work will therefore be welcomed by all lawyers in that state. Twenty years have passed since the first edition was published, yet in spite of the changes in the code and the many decisions of the court, the editor of the present edition has found very little to change in the first edition. His work has consisted almost entirely in noting the amendments to the code in the past twenty years, and the decisions of the courts during that period. These amendments and decisions are collected annually in the *New York Annual Digest* under the title "Code

of Civil Procedure." This digest should render the task of one editing a book on code practice easy, and should make it possible for him to attain the highest degree of accuracy.

The actual merits of the editor's work can, perhaps, be ascertained only by use. However, to test the accuracy of the present work we have examined all the cases on the code decided during 1905 and 1906, and the amendments to the code in those years. We have found many errors, both of omission and commission, of which the limits of this review will not permit any extended statement. For example, the editor states that a motion to discharge an attachment must be made before final judgment, and he cites § 687 of the code in support of that proposition (p. 1258). That section was amended by the Laws of 1906, c. 507, so that such a motion is allowed after judgment. Again, he states that an action may be discontinued without the consent of the attorney (p. 1588); he fails to note in that connection that § 55 of the code provides that a party can act only through his attorney, nor does he cite the case of *Kuehn v. Syracuse Rapid Transit Co.* (104 App. Div. 580, 587) which so held on a question of discontinuance.

The following cases which have an important bearing on some of the subjects treated by the editor were not noticed. *Davids v. Brooklyn Heights R. Co.* (104 App. Div. 23; aff. 182 N. Y. 526), on the liability of a master for arrest under § 849 for assault committed by servant; *Carlisle v. Barnes* (183 N. Y. 272), holding that where the chief judge of the Court of Appeals has denied leave to appeal to that court, the party cannot get such leave from another judge; *People ex rel. Jerome v. Court of General Sessions* (185 N. Y. 504), holding that prohibition is the proper remedy where the Court of General Sessions is about to exceed its powers by granting a new trial; *Matter of Sherril v. O'Brien* (186 N. Y. 1), holding that an order denying a writ of *mandamus* to be appealable to the Court of Appeals must recite that the writ was not refused by the Supreme Court in the exercise of its discretion; *Matter of Schroeder* (113 App. Div. 221), holding that objections as to form of referee's report cannot be raised on appeal; *Lawton v. Partridge* (111 App. Div. 8), holding in an action against joint defendants a judgment against one is authorized; *Lederer v. Lederer* (108 App. Div. 228), holding that reference may be terminated when the referee files an invalid report (this case is cited by the editor (p. 1878), but not for this proposition); *Jones v. Fuchs* (106 App. Div. 260), holding that a court has no power to extend the time to serve summons in a case where an attachment is made; *Ross v. Metropolitan St. Ry. Co.* (104 App. Div. 378), on the motion for a new trial; *Frick v. Freudenthal* (45 Misc. 348), holding that an allegation as to fraud cannot be regarded as surplusage.

The editor would have added greatly to the value of the present edition if he had indicated in an introductory chapter the changes in the code in the past twenty years. He has, moreover, failed to add a table of cases; an unpardonable omission in a modern law book. Nor has he stated that he has not continued Mr. Abbott's plan of citing the cases in other states than New York.

S. J. R.

SUITS IN CHANCERY. By Henry R. Gibson. Second Edition. Knoxville, Tenn.: Gaut-Ogden Company. 1907. pp. xx, 1203. 8vo.

The title of this volume is not only descriptive of its scope, but is highly characteristic in its conciseness and comprehensiveness of the work itself and of the author. In 1891 Judge Gibson, with a mind enriched with learning and ripened with years of experience in the practice and upon the bench of the chancery courts of Tennessee, appreciating the needs of a guide to chancery practice for use by Tennessee lawyers, put forth his first edition of this work. The volume was promptly accepted according to its real worth as an authority, has continued to hold its rank, and has become, more than a mere convenience, an absolute necessity to every Tennessee lawyer.

If it were possible to improve upon the perfect it might well be said that

Judge Gibson has accomplished this impossible task in preparing his second edition. He has made many substantial changes, has eliminated the few errors, if such there were, that crept into the work as it was first published, has rewritten many portions thereof, and has added many chapters and sections to cover such points as, in his desire to limit as far as possible the size of the volume, were omitted from the first edition. He has practically rewritten, with many amplifications, the chapters pertaining to injunction and attachment proceedings, and has added sections upon the subjects of reforming or rescinding written contracts, winding up partnerships, subrogation, exoneration and contribution, *quo warranto*, *quia timet* and *mandamus*, and relief under bills of discovery. The mere suggestion of these titles discloses the scope of the work, particularly if it be borne in mind that while the author has intended primarily to publish a book of practice, in order to present properly the forms and proceedings, he has found himself compelled to present and has presented in a condensed but very accurate manner many of the questions of substantive law pertaining thereto. The volume now stands before the legal public as a concise, comprehensive, and accurate discussion of the laws, and a presentation of the rules and forms of practice of substantially every phase of the many possible sorts of chancery proceedings.

While the book is framed and intended primarily as a guide to the Tennessee lawyer, with special reference to the Tennessee code, statutes, and decisions, it is nevertheless copious in its references to the works of Pomeroy, Story, Daniel, and Barbour, and by reason thereof it could not but be of value to the profession at large in its discussion of general subjects, and in the almost innumerable forms of bills, answers, motions, decrees, etc., prepared by the author. The work is in no sense intended only for the beginner, although it is of incalculable value to him, but is intended for and is accepted by the profession from the youngest to the oldest as an indispensable article of office furniture, and it fully merits this consideration.

H. H.

THE PUBLIC RECORDS AND THE CONSTITUTION. By Luke Owen Pike.

London: Henry Frowde. 1907. pp. 39. 8vo.

In this essay the author has traced, by a short history of the Public Records, the evolution of the form of the present English government from the Council of William the Conqueror. Its striking feature is the manner in which the parallel between development of institutions and the creation of Records is emphasized. To Mr. Pike the Records are at once the evidence and the result of growth. Thus he traces to the great survey of England made by the Commission created by William I and the Council of Gloucester, recorded in the Domesday Book, the centralization of the English Revenue. From the justices sent throughout England by Henry I he derives the present courts, and from the records of these justices in Eyre, the present Law Reports. From the great Council of Edward I he traces the present Privy Council, and the present Parliament—with their corresponding chain of records; and from the principal secretary of the King, to whom the Privy Seal was eventually confided, he derives the Principal Secretaries of State, who form such an important part of the Cabinet. At the end is an admirable diagram, in the nature of a genealogical tree, which shortly and clearly summarizes the whole.

E. H. A., JR.

THE LAW OF PRIVATE PROPERTY IN WAR. By Norman Bentwich. London: Sweet & Maxwell, Ltd. Boston: The Boston Book Company. 1907. pp. xii, 151. 8vo.

"This book," the preface begins, "is based upon the essay which won the Yorke Prize at Cambridge University in 1906"—a fact which is perhaps the keynote to its character. The work is not of the "exhaustive" type: the author's aim is rather to present broadly the general principles governing his subject, sketching with extreme brevity their history, discussing the extent of present

adherence to them, and speculating as to changes both in principle and in practice that are advisable. The subject is not handled as a matter of case law, even where, as in the case of maritime law, it is susceptible of such treatment. Somewhat over a hundred cases, largely American, are cited, but the collection does not apparently purport to be substantially complete. It follows that to the active practitioner the book will have little value, and the same thing is true for the student of the subject. But to the beginner, and to the lawyer who would obtain a general view of this subject in a readable and reasonably concise form, the book will be very welcome. Its style is pleasant and smooth, and the presentment, with its slight British bias, clear and comprehensive.

Some very interesting problems are discussed, of which we may mention the question as to the power of common-law courts to protect private property of the inhabitants of conquered territory from executive confiscation incident to the acquisition of the territory. It is believed, however, that the author is mistaken in thinking that in such case "the law of the nations is, by an article of the Constitution" of the United States, "part of the law of the land" (p. 20). But his contention that recent English decisions on the point were ill-advised, and that in such case the courts should adjudicate upon private rights in accordance with the principles of international law, though admittedly without common-law support, is strongly urged, and worthy of consideration.

A. R. G.

THE MECKLENBURG DECLARATION OF INDEPENDENCE. By William Henry Hoyt. New York and London: G. P. Putnam's Sons. 1907. pp. xv, 284. 8vo.

In the last few years interest has again been aroused in the moot case of the Mecklenburg Declaration of Independence by the discovery of fresh evidence bearing on the controversy. There seems no doubt that the patriotic committee for Mecklenburg County, on May 31, 1775, passed a set of resolutions which were in effect a contingent declaration of independence. But since 1817 an energetic effort has been sustained to force general belief in a more formal and unconditional declaration, asserted to have been pronounced on May 20, 1775, in language strikingly similar to the federal Declaration. Here, then, is the crux of the matter. Was there a separate declaration on May 20, whose spirit was softened in the May 31 resolves, or was it the latter resolves which were recalled and written of incidentally as a declaration of independence?

In favor of the existence of the earlier declaration there are alleged copies and circumstantial evidence. Dr. George W. Graham, in his book published in 1905, found in the more recently discovered evidence new grounds for supporting this view. Mr. Hoyt has reached the opposite result — one that to the layman seems the more reasonable. It would not do to say that he has written the last word on the question, but it will probably be the last word of moment until irrefragable documentary evidence comes to light. No existing clue seems to have been neglected by Mr. Hoyt. His spirit is that of the impartial judge, his logic is convincing, and his style is clear and readable. The exposition should be interesting to every student of American history. H. S.

THE GOVERNMENT OF INDIA. By Sir Courtenay Ilbert. Second Edition. Oxford: At the Clarendon Press. London and New York: Henry Froude. 1907. pp. xxxii, 408. 8vo.

The author of this book brings to his task exceptional qualifications. At one time he was law member of the Council of the Governor-General of India, and he is at present Clerk of the House of Commons, so that both from familiarity with Indian affairs gained by personal experience, and from acquaintance with British legislative and administrative ideals, he can speak with authority.

The purpose of the book is to show the necessity for consolidating the English statutes relating to India, and to show in what way it can be done. The first chapter contains an historical introduction, covering some hundred pages and yet much compressed. The author has written solely from the view point of one interested in constitutional law; and it is necessary to have some knowledge both of English and of Indian history in order to understand and appreciate his work. The same criticism may be made of the summary of existing law that follows. But a careful reading presents forcibly the necessity for consolidating the various enactments. That it is possible to do so Sir Courtenay Ilbert proceeds to demonstrate. He has collected all the statutory enactments relating to the government of India, arranging them in convenient order according to the principles adopted in preparing consolidation bills for presentation to Parliament, and he has added explanatory notes. This work is largely based on the consolidating draft of 1873, which he has brought down to date. If the British government sees fit to pass a consolidating act, this work will be of unquestionable value. Even if consolidation is not enacted, it should be an almost invaluable handbook for Indian administrative officials. It is also of interest to the student of comparative law, legislation, and administration.

S. H. E. F.

LEADING CASES ON THE LAW OF EVIDENCE. By Ernest Cockle. London: Sweet and Maxwell, Ltd. 1907. pp. xii, 224. 8vo.

The title should be "Leading Cases on the English Law of Evidence," since English cases alone have been selected. At the head of each case is a short statement of the principle to be illustrated, then follow the facts and that portion of the opinion which deals with the point at issue. To this the author usually adds a footnote of comment or explanation. Such an arrangement is compact and clear. On the other hand so little of each case is given that the reader cannot tell by examination whether the point is the sole, or one of several grounds for the decision. The index, however, is full and well arranged, and thus gives a fairly adequate summary of the subject. The scope and value of the book within its somewhat limited field would be greatly increased if each leading case were followed by a reference to those English cases wherein it has been cited, explained, or distinguished.

E. H. A., JR.

A TREATISE ON THE MODERN LAW OF BANKING. By Albert S. Bolles. In two volumes. Philadelphia: George T. Bisel Company. 1907. pp. lxxix, 508; 509-1124. 8vo.

A TRUSTEE'S HANDBOOK. By Augustus Peabody Loring. Third Edition. Boston: Little, Brown, and Company. 1907. pp. xxxvi, 224. 12mo.

SAMUEL FREEMAN MILLER. By Charles Noble Gregory. Iowa Biographical Series. Iowa City: The State Historical Society of Iowa. 1907. pp. xvi, 217. 8vo.

TRIAL EVIDENCE. By Richard Lea Kennedy. St. Paul: The Keefe-Davidson Company. pp. vii, 49. 8vo.

MANUAL OF CORPORATE TAXATION IN NEW YORK. New York: Fallon Law Book Company. 1907. pp. xv, 119. 8vo.

DIE KUNST DER RECHTSANWENDUNG. By Lorenz Brütt. Berlin: J. Gutentag. 1907. pp. 214. 8vo.

THE LAW AND THE GOSPEL OF LABOR. By Luther Hess Waring. New York: Neale Publishing Company. 1907. pp. 140. 12mo.

STREET RAILWAY REPORTS ANNOTATED. Volume IV. Albany: Mathew Bender and Company. 1907. pp. iv, 1218. 8vo.

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CONTRIBUTORY NEGLIGENCE.

THE opinions in the earliest cases upon contributory negligence, *Butterfield v. Forrester*,¹ and its little known predecessors, *Conden v. Fentham*² and *Clay v. Wood*,³ offer no indication that the court is aware that any new doctrine is being announced. That a plaintiff who by his own misconduct in conjunction with that of the defendant has brought harm upon himself, cannot recover damages, is stated as a well-settled rule. There is, therefore, no discussion of general principles, no logical argument applying such principles to the particular facts and showing that they necessitate the result reached by the court. All attempts to ascertain upon what legal principle the defense of contributory negligence is based, are therefore efforts *ex post facto*, to explain and account for a result already reached apparently unconsciously. The ready acceptance by the profession of the decision as conclusive, the entire absence of any attempt by counsel to attack it, seems clearly to negative the idea that it was an innovation, an anomalous rule applicable only to its own circumstances, — justifiable only by its convenience and utility. Had it not been the exhibition under the peculiar circumstances of some well-settled, universally recognized and accepted general legal conception, there can be no doubt that its introduction would have been sharply contested, instead of hardly causing a ripple in the placid surface of professional thought.

Setting aside, therefore, the suggestion that the defense of contributory negligence is a pure anomaly justified by its utility under the peculiar facts under which it arises, it is necessary to examine

¹ 11 East 60 (1809).

² 2 Esp. 685 (1798).

³ 5 Esp. 44 (1803).

carefully the theories upon which it has been from time to time attempted to explain the defense, to see whether any of them in reality offers a satisfactory explanation, and if not, whether there is in fact any fundamental principle of legal thought to which it can be ascribed.

Three theories are commonly advanced as to the basis of the defense of contributory negligence. It is maintained that it depends on the application to the particular facts of the rule governing (1) proximity of legal causation; (2) indemnity or contribution between joint tortfeasors; or (3) voluntary assumption of risk as expressed in the maxim *volenti non fit injuria*.

Taking first the theory that the plaintiff's wrongful assisting act breaks the chain of proximate causation between his own harm and the defendant's misconduct,¹ it is necessary to ascertain if possible what proximity of legal causation is, and what part it plays in legal liability.

It would be obviously opposed to any possible conception of justice that any one should be required to answer for a harm unless he had actually caused it. It is therefore always a vital prerequisite to recovery to establish that the plaintiff's harm was caused by the defendant's alleged misconduct. As to what is to be regarded as the cause of any given result admits of much difference of opinion. It is possible to regard as a cause any *causa sine qua non*, without which the result would not have happened, including every antecedent to the most remote, or, again, only to consider that a cause which operates directly to produce the result. Or the true conception may well be taken to lie between these two extremes.

Legal proximity of causation may be defined as that conception of cause and effect which has been adopted by the courts as the test by which to ascertain whether a particular harm is to be ascribed to a particular act or omission as its consequence as a prerequisite to the imposition of legal responsibility therefor. This conception has from time to time varied. The primitive concep-

¹ This is the explanation usually given by text-writers. Webb's Pollock, Torts, 573; Wharton, Negligence, 2 ed., § 132-133; Whittaker's Smith, Negligence, 373; Thompson, Negligence, 1156; Beach, Contributory Negligence, 10-11 *et passim*; Bishop, Non-Contract Law, § 463, n. 2. And see Bowen, L. J., in *Thomas v. Quartermaine*, 18 Q. B. D. 685, 697. "It [contributory negligence] rests on the view that though the defendant had in fact been negligent, yet the plaintiff by his own carelessness severed the causal connection between the defendant's negligence and the accident which has occurred — and that the defendant's negligence accordingly is not the true proximate cause of the injury."

tion of a sufficient legal cause was a *causa sine qua non*.¹ When this idea was abandoned, the rebound carried judicial opinion to the opposite extreme, that no one should be answerable beyond (1) the direct result of his misconduct, his trespass, his semi-criminal *delict*, or (2) those indirect results actually intended.

As society became more highly organized, civilization more complex, it was evident that to prohibit violence and acts intended to be harmful was not enough; some further protection was required. Similarly, the citizen injured found little real compensation in the good intentions of him who had without violence and unintentionally brought harm upon him. It was necessary to add something to this test of wrongfulness, to this narrow field of liability, so as to enforce a decent social decorum, and to give compensation more really proportionate to the harm sustained by one whose rights were without violence, or unintentionally invaded without fault of his own. It thus came to be said that "every man must be presumed to intend the natural and probable consequences of his act." Here the judges appeared to be merely laying down a rule of purely procedural law, dealing with the effect which might be given to evidence, — a matter manifestly within their powers, and part of their function as presiding officers of a court of justice. Yet in so doing, as in so many other similar cases, without the appearance of judicial legislation, without incurring the stigma attached to law reformers, they substantially changed the whole conception of legally wrongful conduct, and immensely enlarged the limits of legal responsibility for admitted injuries. The presumption, by precluding inquiry into what was actually intended when the result was natural and probable, established between the two things a forced equivalence in legal effect. The whole conception of legal causation was enlarged, and an actor became as fully liable for the natural and probable consequences of his act, though unintended, as before he had been when the result had been foreseen and designed.²

In defining the test by which this new social duty is to be ascertained, this enlarged measure of responsibility applied, the tendency of modern judicial opinion is overwhelmingly toward a full

¹ 2 Pollock and Maitland, *History of the Common Law*, 469-471.

² But while a new conception was added, the old remained and still remains. No question of natural or probable causation arises where the actor actually intended the specific harm suffered, — for that he is now answerable, as he always was punishable, though to others it would appear both an unlikely and abnormal result.

recognition of the popular conception of what is natural or probable as the standard to be adopted. The question, usually one for the jury, is to be solved by them in accordance with what men like themselves would actually foresee as likely to result from the conduct in question, or, after the event, is seen to be in accordance with common experience, such as theirs, of the known and actual course of nature. It is the actual foresight of the average man, in view of the circumstances which he knows or should know, of the real probability of injury to others, picturing the future course of events, the real conditions which will probably be created, the effect of the known habits of human beings and of the ordinary operation of usual natural forces under such conditions, as affecting the injurious tendency of his acts. This is what determines the wrongfulness of the act so far as it depends solely on proximity of causation. So, if the wrongfulness of the act be admitted, it is the actual course of nature depending on the orderly operation of known natural forces, including again the customary habits of mankind under given circumstances, by which proximity of the harm to such wrong is ascertained.

The proximity between the act done and the harm sustained is, however, only one step to the determination of the final question of legal liability.¹ This depends also on many other principles of limitation of legal liability, entirely distinct, in no way depending on causal connection, having their bases in some cases in the historical development of the law, in others in principles of policy, in conservative instinct at times retarding the growth of advanced legal conceptions, or in deep-rooted fundamental principles of justice as conceived and developed in the common law of England.

There was prevalent in the early part of the nineteenth century, just at the time when the earliest cases of contributory negligence were decided, a principle of limitation of liability, purely legal, the creature of judicial rather than popular conception of justice, stopping recovery short of either the probable or natural result of the act complained of. This rule or principle, now practically obsolete,²

¹ Mr. Beven in his admirable treatise on Negligence very properly treats proximate causation as only one of the factors in ascertaining legal responsibility, a factor, it is true, unique in that it is for the jury, a question to be determined by laymen according to their experience of actual affairs.

² The decided though perhaps not unanimous tendency of modern authority is to make the liability of the original actor depend not upon the negligence or even intentional wrongfulness of the subsequent act of a third party, which is the final decisive

was thus stated by Lord Ellenborough¹ in the leading case of *Vicars v. Wilcocks*.² "Special damage" — the case was one of slander — "must be the legal and natural consequence of the words spoken. Here it was an illegal consequence, a mere wrongful act of the master" (who discharged the plaintiff in consequence of what the defendant had said). "His Lordship asked whether any case could be mentioned of an action of this sort, sustained by proof only of an injury sustained by the tortious act of a third person."³

It is highly doubtful if this limitation has any real relation to proximity of causation. To consider the last acting efficient cause, the final decisive impulse, as the sole responsible cause would merely be to change the judicial conception of causal connection sufficient to create *prima facie* liability. Since, however, the

cause of the plaintiff's harm, and so upon the legal culpability of such act, but rather upon this, — whether or not, in view of the surrounding circumstances, and the conditions which the defendant's conduct may be expected to create, the third party's subsequent action was normal, and so, expectable. *Burrows v. March Gas Co.*, L. R. 7 Exch. 96; *Clark v. Chambers*, 3 Q. B. D. 327; *Englehart v. Farrant*, [1897] 1 Q. B. 240; *McDowell v. R. R.*, [1903] 2 K. B. 331; *Lane v. Atlantic Iron Works*, 111 Mass. 136. See also *Snyder v. R. R.*, 85 Pac. 686 (Col.), where the rule in *Lane v. Iron Works* is approved, but the intervening act is held to be one which under the circumstances was abnormal and unforeseeable. It is true that if the intervening act be intentional the defendant is usually not liable. There is normally no reason to anticipate wilful wrongdoing of others, but this only bears on the question as to whether the act is expectable or not. In exceptional situations even wilfully wrongful acts of others are normal and expectable. *Harrison v. Berkley*, 1 Strob. (S. C.) 525; *Kennedy v. R. R.*, 32 Pa. Super. Ct. 623 (a passenger injured by riotous students assembled to greet a returning football team). Compare *Snyder v. R. R.*, *supra*. And see *Cobb v. R. R.*, [1895] A. C. 419, and *Pounder v. R. R.*, [1892] 1 Q. B. 385. The liability of a negligent defendant is carried to a great length in the recent case of *De LaBere v. Pearson*, [1907] 1 K. B. 483, where a newspaper proprietor is held liable to a subscriber whose money had been stolen by a broker, an undischarged bankrupt, to whom it had been entrusted by the subscriber for investment on the recommendation of the financial editor, who had taken no pains to ascertain the true character of the broker, of which, however, he did not actually know. While this is the tendency of modern cases, the rule of *Vicars v. Wilcocks*, 8 East 1, still occasionally crops up as a refuge to a court wishing in a hard case to relieve some unfortunate rather than morally wrongful delinquent from the extreme burden of full liability for all the actually proximate results.

¹ The same judge who decided *Clay v. Wood* (1803) and *Butterfield v. Forrester* (1809).

² 8 East 1 (1806).

³ Lewis for plaintiff states the modern view. "It was not less a consequence of [the slander] because the act so induced was wrongful on the part of the master." He said he could find no case where such a construction was laid down. It is to be noted that Lord Ellenborough in his opinion cites none, and that the practice at *Nisi Prius* was understood to be otherwise.

last actor, the author of the final decisive act, is regarded as the sole center of legal responsibility only when such act is legally a wrong, it is evident that it is not with the causal relation alone that one is dealing, but with the causal relation plus some restrictive principle or policy of remedial law, which, where the injured party has recourse against the last wrongdoer, considers him sufficiently protected, and relieves the antecedent wrongdoer of an onerous and superfluous burden.

Mr. Beven is therefore probably right in treating this as a separate limitation of legal liability quite distinct from proximity of causation. However, courts and text-writers less discerning than Mr. Beven, seeing in the rule of *Vicars v. Wilcocks* an apparent kinship to proximity of causation in that it dealt with the liability for the effect of acts as depending on the legal character of an essential link in the chain of actual causation, treated it not as a separate principle of law stopping liability at a point short of the limits of actual proximity, but as an auxiliary rule enforcing, where there are successive acts of misconduct, an arbitrary legal conception of proximity, making the last act the sole legal cause.

The disability of the plaintiff, whose negligence was the *final* decisive cause of his harm, to recover, is but an obvious application of the rule in *Vicars v. Wilcocks* to the facts of the case. Similarly the so-called Doctrine of the Last Clear Chance, whereby a defendant whose negligent act was the final decisive cause of the accident was liable to the plaintiff even though the latter had at an earlier stage been guilty of some default placing him within the reach of the effects of the defendant's act, is also a necessary result of that rule applied to such facts,¹ and not, as it appears today, an anomalous exception² based on the hardship which would result from the rigorous and logical application of the general principles of contributory negligence. In *Davies v. Mann*,³ cited as the earliest case of this sort, the only novelty is the exten-

¹ See the charge of Erskine, J., and the language of Parke, B., commenting thereon in *Davies v. Mann*, 10 M. & W. 546 (1842). Curiously enough, the present attitude of judicial opinion, which has practically repudiated the rule of *Vicars v. Wilcocks*, is very largely due to the opinion of this same judge, then Lord Wesleydale, nineteen years later in *Lynch v. Knight*, 9 H. L. Cas. 577.

² See Putnam, J., in *Dredge No. 1*, 134 Fed. 161, arguing that since in admiralty cases the damages were divided, the last clear chance doctrine (a mere merciful anomaly), not being needed, did not apply. But see *Cayzer v. Carron Co.*, 9 App. Cas. 873.

³ 10 M. & W. 546.

sion to successive acts of mere omissive negligence of principles applied in *Clay v. Wood*¹ to successive conscious and intended misconducts.²

But where the misconducts were not successive but simultaneous, the rule of *Vicars v. Wilcocks*, the principle limiting legal liability to the last wrongdoer, had no application. There must be, to use Mr. Brown's phrase, a last legally responsible wrongful agent before there is a sole center of liability. If the acts were simultaneous, the influence of the early semi-criminal aspect of tort which punished a trespasser for his wrong, was still strong enough to hold each wrongdoer, as the criminal law does, responsible *in solido*. The injured party might, at his election, collect from either of the independent wrongdoers whose acts together, judged by the popular view of proximity, had caused his harm, the full loss sustained, and it was no defense, not even a mitigation of damages, that others beside himself had in part caused the loss; not even that but for such other's conduct his act might or would probably have been harmless. Yet when the case of a plaintiff guilty of negligence contemporaneous with that of the defendant came up for decision in *Vennall v. Garner*,³ and in *Pluckwell v. Wilson*,⁴ it was held that the plaintiff could not recover for harm caused in part by each, Bayley, B., saying in the first case, "If the mischief be the combined negligence of both, they must remain in *statu quo*, and neither can recover against the other"; and Alderson, B., a most accurate judge, charged the jury in the second, that, "If the plaintiff's negligence in any way concurred in producing the injury, the defendant is entitled to the verdict."

In fact, taking legal cause to include, as in effect it did at that time, the modification that an antecedent misconduct affording an opportunity for a later default to work mischief was not the legal cause thereof, the rule might be stated thus: If the plaintiff's act was any part of the legal cause of his harm, he can have no legal redress against a defendant whose misconduct was also part of the legal cause of the harm. No existing conception of legal even as

¹ 5 Esp. 444.

² Where the two negligent acts are successive, Mr. Beven's statement that "Contributory negligence is but a case of negligence not dependent on any different rule of law, but presupposing the limitation of the general question of negligence to an inquiry as to which of two persons its final impulsion should be imputed," is a substantially accurate statement of the law as it existed when the earlier cases were decided.

³ Beven, *Principles of the Law of Negligence*, 2 ed., 176.

⁴ 2 Tyrw. 82.

⁵ 5 C. & P. 375.

distinguished from actual causation was adequate for this situation. Evidently some further fundamental restrictive principle bars recovery.

Does this then existing conception admit of a modification which without utterly destroying the fundamental ideas underlying it will account for the result? Does the added element of the plaintiff's authorship of one of the concurrent negligent causes render his harm remote in any sense cognate to that recognized by the existing conception of legal causation? So far legal causation has dealt with the relation of act to result as cause to effect. The modification in *Vicars v. Wilcocks* added to a consideration of the actual sequence of events a scrutiny of the legality or illegality of the various steps therein, but even so modified¹ the rule deals with the various links in the chain of causation as between a harm as a physical consequence and the act which is alleged to cause it as an act, and is applied impartially to ascertain in all cases whether a sufficient causal relation exists to render the actor liable for the harm suffered. The change now proposed is not a modification, as this is, of the primary conception of proximate causation; it is, on the contrary, an entirely new and antagonistic idea. Admittedly it does not afford a test whereby in all cases the question of the defendant's liability, in so far as it depends on the proximity of causation between his act and the plaintiff's harm, is to be determined. On the contrary, it applies only in particular cases and between parties litigant to destroy a chain of causation sufficient to render the defendants *prima facie* liable, and it regards an act, already seen to be a sufficient link in the chain of legal causation, as a break therein, not because any new fact has altered its actual position in the sequence of events, not even because of some newly discovered legal characteristic, but simply because the person legally responsible therefor is seeking compensation for the harm it has aided in bringing on him. This is not a modification of the original conception of legal proximity; it is an entirely new and antagonistic principle. The one deals with the relation of fact to fact as *facts*, the other concerns itself with the merits and demerits of the authors thereof as parties litigant. Since the facts and the connection between them remain the same by whomsoever they are done, and since these facts are already seen to be legally cause and effect, it is impossible to say they are no

¹ Granting that the modification has any real connection with causation, which is more than doubtful, see *ante*, p. 238.

longer so connected because the same party who sues is legally the author of one of those assisting acts already seen to be sufficient links in the chain of causation,—at most one can say merely that they are deemed or presumed to break the chain of causation. But, as in all cases when a presumption demands that two things shall be considered the same, which reason tells us may well be quite different, we are driven back to the final inquiry—what rule of remedial law—what principle of public policy or what fundamental conception of justice common to all jurisprudence or peculiar to our common law requires the arbitrary legal equivalence between two things not in their nature necessarily similar, or even, as in this case, fundamentally opposite to one another?¹

No conception of legal cause which has ever been applied to ascertain legal liability in general will account for the doctrine of contributory negligence in all of its phases. While the rule in *Vicars v. Wilcocks* might account for it where the negligences are successive, it has no application where they are concurrent. The modern view that legal causation depends on what is actually probable and natural, and that the mere wrongfulness of an existing act is *per se* immaterial, leaves even the case of successive negligences without support in the now existing principles of legal proximity of cause and effect. To ascribe the defense of contributory negligence to a principle which never fully accounted for it, and which now fails to account for it at all, only serves to cloud the subject of legal causation, already replete with difficulties, by introducing a new and alien conception, without aiding in ascertaining the final

¹ Of course it is possible to account for the defense of contributory negligence, or rather to conceal the fact that there is anything to account for, by using the term legal causation in a sense which it is capable of bearing without any palpable distortion of language, as indicating those results for which the originator of the alleged cause is responsible legally,—the argument in favor of such a reasoning has some apparent force. How can it be said that any result is the legal consequence of an act which the law deems so far removed, whether by reason of its lack of actual proximity or because of any principle limiting legal liability for actually proximate results, that it refuses to recognize it as a basis of legal claim or redress against the author of the alleged cause? Obviously, however, this is merely to state in terms of apparent causation the limits of legal liability. It does not in any way explain why liability is so limited. It is possible in this way to state the whole of the substantive law in terms of causation, as Professor Greenleaf in his second volume of his work on Evidence stated it in terms of evidence. One could as well account for the inability of an alien enemy to recover for a harm specifically intended, and directly caused, by saying that the act was not the legal cause of his injury, or say that a judge's abuse of his judicial power in maliciously committing an attorney did not legally cause his resulting imprisonment.

basis upon which rests the inability of a plaintiff, whose harm has been caused in part by his own misconduct, to recover from his fellow delinquent.

Clearly the defense of contributory negligence cannot be ascribed to the rule which denies contribution or indemnity between joint tortfeasors. Contribution and indemnity are concerned with joint wrongdoers: *first*, those who associate themselves to do the particular wrongful act, or from some prior association are as a group under some joint liability;¹ *second*, those who are by reason of some rule of remedial legal policy held jointly liable for the conduct of the actual wrongdoer, or the condition of the injurious thing;² *third*, those who are under successive duties in regard to the same dangerous condition;³ or, *fourth*, where the plaintiff relying on the defendant's apparent right to deal with property so acts by his authority as to incur liability to the true owner.⁴ It has never been applied to cases of concurrent but independent wrongs to the combined effect of which the harm is due and where the only point of contact is in the combination of their effect in bringing about the final catastrophe.⁵

Even in their application to these widely different fields the development of the two principles has been entirely separate; the limitations and exceptions to them not merely distinct and different, but often the very opposite to one another.

1. Contribution, though refused between persons actually themselves the wrongdoers, is allowed where they are not personally

¹ *Peck v. Ellis*, 1 Johns. Ch. (N. Y.) 131; *Nickerson v. Wheeler*, 118 Mass. 295 (a failure to file certificate, a duty placed on directors as a group).

² Two partners owning a stagecoach — one was sued by a passenger injured by negligence of a driver — having paid judgment, he was held entitled to contribution from his partner. *Worley v. Batte*, 2 C. & P. 417; *Horbach v. Elder*, 18 Pa. St. 33; *Bailey v. Bussing*, 28 Conn. 455; *Clarion Co. v. Armstrong Co.*, 66 Pa. St. 218 (bridge reparable by two counties).

³ See *Washington Gas Light Co. v. Dist. of Columbia*, 161 U. S. 316, and cases cited therein. The most usual case of this sort is where a city is forced to pay damages for injuries caused by a defect in the highway created by a lot-owner.

⁴ See similar principle, *Sheffield v. Barclay*, [1905] A. C. 392.

⁵ Save in the case of *Nashua Iron Co. v. Worcester R. R.*, 62 N. H. 159, wherein the rule of last clear chance was applied to give indemnity against the last responsible actor in favor of the antecedent wrongdoer. While the case contains a very valuable discussion of the application of the rule of last clear chance, it would seem to be a sheer anomaly in regard to its ruling as to the right to indemnity. All the cases which it cites for the broad rule that indemnity is allowed save where the party seeking redress was a conscious wrongdoer, fall within far narrower exceptions to the rule denying indemnity between joint tortfeasors.

delinquent but are both liable for the acts of the actual wrongdoer by virtue of some relation in which they stand to him. Indemnity is given to the person morally innocent but legally liable, as against the actual wrongdoer whose misconduct has brought the liability upon him. On the other hand, a plaintiff is as much barred by his servant's negligence as his own, though the defendant is personally in fault. So, while the rules of contribution and indemnity regard as vital the difference between actual wrong and legal liability, contributory negligence regards them as immaterial.

2. In ascertaining the right to indemnity the law distinguishes between primary and secondary duties, between active misconduct and mere omission of duties of protection, between the creator of the dangerous condition, and him who should have protected the injured party from it. In contributory negligence the plaintiff is as completely barred from recovery where he has failed to take self-protective measures against a danger created by the defendant, as where he has himself created the danger and the defendant has failed to protect him therefrom. In fact, the last clear chance doctrine enforces the very opposite idea. It is the sequence in time of the successive negligences which is vital. He whose negligence is the final decisive cause of the harm must answer for it; while in regard to the right to indemnity, the actor, the creator, is liable over to him whose neglect of his positive duty is the final efficient cause, who had the last clear chance, if he had done what he was legally bound to do, to avert the harm.¹

It seems equally undoubted that the defense of contributory negligence is not a mere variation nor an application to the specific facts of the rule that one who voluntarily encounters a known risk can blame no one but himself for the ensuing harm. In the earlier cases there was little, if any, attempt made to distinguish between voluntary assumption of risk and contributory negligence. Whether

¹ See *Union Stock Yards Co. v. C., B. & A. R. R.*, 196 U. S. 217. The case of *Nashua Iron Works v. R. R.*, 62 N. H. 159, must be regarded as anomalous. Even if the broad principle there laid down, that indemnity is to be allowed whenever the wrongs are not consciously or wilfully done, is admitted, this only marks the more strongly the essential dissimilarity to contributory negligence — when, of course, no such distinction is drawn — nor is any case cited to show that not merely contribution, but full indemnity is to be enforced, as between joint tortfeasors technically guilty though morally innocent, against the last responsible agent. In *Palmer v. Wick, etc.*, S. S. Co., [1894] A. C. 318, there is an intimation that the Law Lords wished that the English law recognized, as the Scotch law does, a right to contribution for "*quasi delicts*," but even there the recovery was expressly based on the fact that the original judgment which plaintiff paid was a joint judgment against both him and the defendant.

the risk, though perceived, was voluntarily encountered, whether it was, though not seen, obvious if the plaintiff had used his senses, or capable of being discovered had he been properly on the alert, or whether he had, after knowledge of his danger, failed to exercise that care which even then would have sufficed to avert the harm, he was equally barred. It mattered little whether his conduct was regarded as an assumption of risk or as contributory negligence.¹ Nevertheless there arose from time to time cases where the two had to be distinguished, because, while contributory negligence was no bar, the voluntary assumption of a known risk did prevent recovery. Early cases are therefore not entirely wanting which recognize the inherent difference between the two.²

Of late years, however, there has come into existence a constantly increasing class of cases where, for various reasons, a risk perfectly recognized is held not to be assumed by one placing himself within reach of it, but where none the less he may be barred if he is guilty of contributory negligence.³ The distinction between voluntary

¹ This same confusion of thought still persists in many classes of cases. Many conscious intentional acts obviously exposing the actor to perfectly recognizable risks are still constantly spoken of as acts of contributory negligence. There is, however, a growing tendency to more accurate classification. See *Burns v. R. R.*, 183 Mass. 96; *McDonough v. R. R.*, 191 Mass. 509; *Harding v. R. R.*, 217 Pa. St. 69, where the act of standing on the platform of a trolley car is treated as an exposure to a known danger incident to the position; the only open question being as to whether or not the exposure was voluntary and the injury the result of a risk which should have been recognized as inherent in the position assumed. See *Smith, J.*, in *Thane v. Traction Co.*, 8 Pa. Super. Ct. 451.

² See *Lynch v. McNally*, 73 N. Y. 349, and *Mullen v. McKesson*, 73 N. Y. 195, where it was held that while the defendant, who had kept on his premises animals known to be vicious, was not relieved of liability by contributory negligence of the victim in failing to take care to avoid such animals, he was relieved if the plaintiff with full knowledge of the dangerous nature of the animal deliberately put himself within reach of it. Compare the decision of *Paulus*, Sent. Rec. 1, 15, § 3, "*ei, qui irritatu suo feram bestiam vel quancumque aliam quadrupedem in se proritaverit, eaque damnum dederit neque in ejus dominum neque in custodem, actio datur.*" In this respect the civil and common law seem to be at one.

³ Of these by far the most important are those dealing with relations of employer and workman. Many statutes have been passed, and more will undoubtedly be enacted, requiring of the employer either care in the preparation of a safe plant in general, or some particular specific protective precaution. In some of these it is expressly provided that knowledge of the breach of such statutory requirements and a continuance in their employment thereafter shall not bar recovery. *Schlemmer v. R. R.*, 205 U. S. 1; N. Y. Employers' Liability Act of 1902. In others the same result has been reached by judicial construction. *Smith v. Baker*, [1891] A. C. 321; *Narramore v. R. R.*, 96 Fed. 298. There are also some cases where, while contributory negligence is no bar, voluntary assumption of risk defeats recovery. See *Mullen v. McKesson*, *supra*. It is by no means certain that this is not so of the Employers' Liability Act, applicable

assumption of risk and contributory negligence has thus become of immense practical importance, and it is essential to fix with precision the exact boundary between the closely adjacent fields which they occupy.

One suggested line of demarcation may be at once dismissed. The weight of reason and of authority is against the view that voluntary assumption of risk is confined to relations created by contract, and arises out of an implied term of the contract creating the relation.¹ It is, on the contrary, an incident inevitably attached by law to all relations and associations, contractual or otherwise, which are voluntary upon both sides. The plaintiff's actual consent to run the risk is immaterial; having no right save that derived from the defendant's consent to enter into relation or association with him or his property, he cannot complain because the defendant makes that association dangerous. He may either take it as he finds it or leave it, but if of his own free choice he chooses to enter into association with the defendant, he must *perforce* accept the risks obviously inherent therein, no matter how strongly he protests against them, or how emphatically he expresses his unwillingness to run them.

The differences between voluntary assumption of risk and contributory negligence are many and fundamental.

1. Voluntary assumption of risks negatives the idea of even *prima facie* liability. If the plaintiff has no legal right to place himself in juxtaposition² with the defendant, his premises or business, if his association therewith is entirely dependent upon the latter's consent, the defendant owes him no duty in regard to the condition of his premises or plant or the system which he chooses to adopt in the conduct of his business, save that the actual shall conform to the apparent conditions. If the danger be apparent, there is no further duty; if it be not apparent, then notice of it must be given.

to carriers engaged in interstate commerce, passed by Congress, June 11, 1906. See 20 HARV. L. REV. 94, n. 3. While this act has been recently declared unconstitutional, *Howard v. Ill. Cent. R. R.*, and *Brooks v. So. Pac. R. R.*, U. S. Sup. Ct., Jan. 6, 1908, there seems no doubt that some similar act will sooner or later be passed in a form designed to meet the objections of the court — in fact such a measure has already been introduced by Senator Knox.

¹ See Bowen, L. J., in *Thomas v. Quartermaine*, 18 Q. B. D. 685, 698, and Knowlton, J., in *O'Maley v. South Boston, etc., Co.*, 158 Mass. 135, 136. See *contra*, *St. Louis Cordage Co. v. Miller*, 126 Fed. 495, and *Stonington Co. v. Mann*, 219 Ill. 242.

² *Henn Collins*, then M. R., in *Burr v. Adelphi Theatre Co.*, [1907] 1 K. B. 544.

2. The plaintiff must voluntarily, consciously, and deliberately elect to encounter a known risk. No risk can be said to be assumed until the plaintiff has knowledge of the danger and elects to enter into the association subjecting him to it, or, having an opportunity to discontinue an association in which some new danger is discovered, chooses not to do so.¹

3. The plaintiff's inability to recover where the danger being known is voluntarily encountered is not based upon any thought that in so doing he has acted improperly, or has fallen away from the normal standard of proper behavior. It is based on the idea that the plaintiff, being free to take or leave the association, has, with full knowledge of its danger, chosen to take it, and upon the idea that the defendant, being free to refuse to allow the plaintiff to come into juxtaposition with him at all, owes him no duty beyond that of full disclosure of the true conditions under which the relation is to be maintained. Therefore it does not matter whether, in view of the extent of the danger and of the advantages to be derived from encountering it, a reasonably prudent man would or would not have subjected himself to it. The risk may be of the slightest and most remote, the object to be attained by encountering it the very livelihood of the plaintiff; his act may therefore be prudent or even praiseworthy, but he is just as much barred from recovery, the defendant owes him no greater duty than if the risk was enormous and the advantage to be gained trivial and so his conduct both reckless and foolish.

1. Contributory negligence, upon the other hand, is an affirmative defense,² operating at a later stage of the proceedings to displace a liability *prima facie* established. A finding by the jury that the plaintiff has not assumed the risk voluntarily does not negative the existence of contributory negligence on his part, nor prevent the defendant from setting it up as a defense.

2. Contributory negligence excludes the idea of deliberation. It involves rather an unintentional failure to measure up to the self-protective duty of a man situated in a civilization where dangers

¹ So where an engineer discovers a defect in his engine during a run — since he cannot leave his post without imperilling the safety of all concerned in the operation of the road, he does not assume the risk by continuing to drive it. He is compelled to encounter it, he cannot be said to voluntarily assume it until he can without danger to himself or others abandon the position to which it is incident. *Mason v. Yockey*, 103 Fed. 265; *Le Duc v. R. R.*, 92 Minn. 287. But see *Williams v. R. R.*, 149 Fed. 104.

² Though this is not universal, it is the general rule. See *Sherman and Redfield, Negligence*, 4 ed., §§ 106-108.

are constantly occurring. If the danger is perceived and consciously encountered, the case is more properly one depending upon (*a*) whether the plaintiff in so doing acted voluntarily, uncoerced by any improper pressure, and having no legal right to do the act in the course of which he must subject himself to it, or (*b*) whether, though he has such legal right, the danger is so great that it is unreasonable in the face of it to insist upon its exercise.

3. The very essence of contributory negligence is that the plaintiff has misconducted himself, that he has done or omitted to do something which under the circumstances of the case a reasonably prudent man would not have done or omitted to do.

These three salient points of difference show sufficiently the essentially dissimilar character of the two defenses.

Save in one particular, that of providing safe conditions of association, one who allows another to enter into even a voluntary relation with him is bound thereby to take care that no act or omission on his part shall subject that other to risks not necessarily involved in the known conditions under which that relation is to be maintained. And the measure of this care is that which a reasonably prudent man would under the known circumstances realize to be necessary to the plaintiff's safety. While the defendant is not bound to make the conditions safe, he is not entitled to act as though they were safe; their dangerous character is one of the circumstances in the light of which the care that a reasonably prudent man would, and consequently which the defendant should exercise to secure the plaintiff's safety is to be ascertained. In a word, voluntary assumption of risk merely negatives the duty to take care to provide safe conditions for association, and so prevents the failure to do so from being actionable negligence when the plaintiff's harm results, so far as the defendant's conduct is concerned, from this alone; it does not affect the defendant's duty in other particulars or the plaintiff's right to recover where his harm is caused by the breach of any duty owing by the defendant to him, nor is it in such case a defense that the defective condition was a concurrent and necessary cause of his harm.¹ So too,

¹ It is not necessary to a valid right of action that the defendant's wrongful conduct shall be the sole cause of the plaintiff's harm; it is enough that it is an essential cause. So he is not relieved from liability, if his misconduct be an efficient cause, by the fact that there is another concurrent cause for which he is not legally responsible, without

where, for any reason, a risk, though knowingly encountered, is held not to be voluntarily assumed, while this throws upon the defendant the duty among other precautions for the plaintiff's safety to make the premises safe, and allows the plaintiff to recover where no other fault on the defendant's part aids in bringing on the harm, it does not insure him against every harm attributable to such conditions, nor relieve him from his duty to conduct himself as a reasonably prudent man would under the circumstances, again including the known dangerous condition.

Consequently, while the plaintiff may be entitled to find the premises or plant safe, and thus his mere act in bringing himself within reach of a known dangerous defect therein in order to assert his right, may not bar his recovery, the risk may be so imminent, the danger so great, so out of all proportion to the value of the object to be gained by encountering it, "that no sensible man would have encountered it"¹ to enjoy the exercise of the right. It may perhaps be doubted whether, in fact, this can be said to be in any true sense contributory negligence; contributory misconduct it certainly is.² Perhaps to distinguish it from contributory negligence in its primary sense of a mere unintentional omission of due caution, of failure to take self-protective care, it may well be termed a contributory default, in the nature of an unreasonable insistence upon the extreme exercise of legal right in the face of manifest and imminent danger.³

which the harm would not have resulted; and it can make no difference whether he is not liable for this concurrent cause because the act was not his own, but that of another legally a stranger to him, or because the act, though his, is one which is not wrongful on his part, he owing to the plaintiff no duty in regard thereto.

¹ Patterson, J., in *Clayards v. Dethick*, 12 Q. B. 439, 445; *R. R. v. Crotty*, 141 Fed. 913.

² It partakes of the nature of contributory negligence in this, that there is a *prima facie* liability on the defendant's part, a duty of care and a breach thereof, and improper conduct on the plaintiff's part set up as a defense thereto. It differs from the primary conception of negligence in this, that a known danger is deliberately encountered. In this it approaches more nearly to assumption of risk. There being, however, a right to enter the relation or do the act involving the risk, it lacks the element of free and unconstrained choice essential to the latter defense.

³ The earliest case of contributory fault was of this character. *Cruden v. Fentham*, 2 Esp. 685 (1798). There the plaintiff ran into the defendant's gig, which was on the wrong side of the road. Lord Kenyon charged the jury that "the fact that the defendant was on the wrong side of the road did not justify the plaintiff in crossing out of his way in order to assert what he termed the right of the road. It was putting himself voluntarily in the way of danger, and the injury was of his own seeking. However, if the jury thought otherwise, they would find for the plaintiff." The jury having found for the

The difference between such contributory default and voluntary assumption of risk is merely one of degree rather than of kind.¹ But even though the risk be not so great as to make the mere encountering of it unreasonable and improper, the plaintiff is still bound to take such care as a reasonable man would deem necessary, in view of the known defective condition of the premises or plant, so that no act or omission of his while upon them or using them shall unduly increase the dangers necessarily inherent in such defective conditions. The difference between assumption of risk, or such contributing default, and true contributory negligence in its primary and proper meaning of mere unintentional conduct falling below the standard of proper social behavior, is not one "of degree of proximity"² alone, but of kind. Voluntary assumption of risk is the mere passive subjection by the plaintiff of himself to the risk of injury inherent in known defective conditions. Contributory negligence is an act or omission on the plaintiff's part tending to a reasonable probability to add new dangers to his situation, not necessarily incident to the known defective conditions, and bringing upon himself a harm not caused solely by them, but created in part at least by his own misconduct.

However, in determining the care which the defendant must use towards the plaintiff in view of the known dangerous condition of the premises or plant in cases where the plaintiff has voluntarily assumed the known risk, and of the care which the plaintiff must take to protect himself where the danger though known is held to be voluntarily assumed, it is essential that the care required be such as can reasonably be required, not merely in view of the dangers known to exist, but also of the proper operation of the defendant's business or the efficient performance of the work on which the plaintiff is engaged. The standard of care must not be unreasonably high. It is not to be forgotten that it is quite possible to nullify either the common law exemption from liability attendant

plaintiff, a new trial was refused, Lord Kenyon saying that "as it was a question of public convenience the verdict had better rest as it was." This case shows the view prevalent among Englishmen of that period as to the extent to which an individual might go to assert and maintain his strict legal rights.

¹ Depending on the extent and imminence of the danger and the value of the right asserted.

² See *Holmes, J., in Schlemmer v. R. R.*, 205 U. S. 1, 13. True it is that contributory negligence generally operates at a later stage of the transaction, and is usually the last of the two concurring causes of the harm sustained, but this is only an accidental incident, and not an essential attribute.

upon voluntary assumption of risk, or a statutory protection placed around those whose necessities force them to encounter, *nolens volens*, well-recognized dangers, by requiring that while, on the one hand, the defendant is relieved of the duty to remove the danger, he must bear the burden of preventing it from ripening into injury by taking precautions which, though theoretically possible, would in practice be incompatible with the use of his premises or plant; or, on the other hand, by requiring that while the plaintiff does not assume the risk, he must bear a similar burden of precaution, impossible if his duties are to be promptly and efficiently discharged. It is practically impossible to conceive of a danger not so imminently dangerous "that no sensible man would encounter it," which cannot be avoided by the exercise of some conceivable precaution on the part of the plaintiff, a workman who in the course of his duty is called upon to deal with the defective tool or appliance, or to come to the place where the dangerous condition exists. Where the legislature has intended to protect such workmen from their own inability to resist the pressure of their economic necessity by providing that certain precautions shall be taken for their safety, which through their inferiority they are unable to insist upon for themselves, to hold, that unless they take such impossible precautions as this, they are to be regarded as guilty of contributory negligence and so barred from recovery, would destroy the protection in that most usual and important class of cases where the workman is injured while himself using the defective tool or appliance, or by coming to the place where the defective condition exists. The protection of such statutes would extend no further than to that small class of cases where the plaintiff's association with the defective conditions is remote; where he is not called on to use the instrument himself, and where the only danger that threatens him is that he may be injured by some fellow servant's use of it. Recovery would only be possible when the injury was received by the use or merely negligent misuse of a known defective tool, not by himself, but by some one with whom he was associated. Where statutes passed by a legislative body whose enactments are to be supreme, are to be construed and applied in jurisdictions where the prevalent economic attitude may be radically opposed to that which prompted the passing of the act, as in the case of federal statutes which are to be enforced and applied by the courts of the various states, it is essential, in order that the statutes may not be judicially nullified, that the courts of the su-

preme jurisdiction shall freely and fearlessly exercise their appellate powers.¹

Even in the absence of that line of decision which has distinguished between contributory negligence and assumption of risk, the points of difference between the two are so many and obvious that the distinctive character of each is plainly apparent. Yet it by no means follows that because the one is not a mere variation or product of the other, they are not both based upon the same fundamental conception of the proper function of private remedial law.

¹ In *Schlemmer v. R. R.*, 207 Pa. St. 198, the Supreme Court of Pennsylvania had decided that when a brakeman was injured in coupling a car unprovided with automatic couplers as required by act of Congress (27 Stat. at L. 537, § 2), though the act expressly provided that knowledge of its violation should not entail assumption of the risk of injury therefrom, his act in lifting his head some few inches too high when making the coupling was contributory negligence *per se*. On appeal to the Supreme Court of the United States this was reversed (205 U. S. 1), and though the decision was by a bare majority of five to four, it is submitted that it is correct and necessary. While the question of negligence is one of mixed fact and law, the function of the court in relation thereto is purely judicial. In all issues of fact the court has and must have the power to keep the jury within a proper exercise of their function of drawing inferences of fact. So, of course, when reasonable men can arrive at only one conclusion upon the undisputed facts, the court may well remove the case from them, a contrary finding being possible only as a result of prejudice or error. Even here their exercise of this power is a matter of judicial discretion, a plain abuse of which is ground for reversal. There is, however, a tendency very marked in some jurisdictions to so exercise this power as to substitute as the standard of proper social conduct, especially on the part of a plaintiff, the opinion of the court as to what the person should do in the best interests of the common weal, for that of the jury as to what the average man would regard as prudent. This tendency is particularly marked in Pennsylvania, a state wherein the doctrine of a protective tariff is regarded as sacred even from criticism, and where the economic attitude is, therefore, naturally toward the encouragement of business even at the expense of the individual. The working out of such a policy which, while popular enough in the abstract on election day, can hardly be expected, in its logical consequence of throwing on the individual the primary duty of protecting himself, if it be in any way possible, from the misconduct of business, to appeal to a jury confronted with a specific instance of its working. The benefit to the community, no matter how strongly emphasized by the court in its charge, is almost sure to be lost sight of in the sympathy for the injured plaintiff, who after all has done about what the jury are accustomed to do habitually and to consider perfectly proper. It is manifest that this conception must be enforced, if at all, by the court itself. To insist on care which the average prudent man would never imagine to be necessary, *i. e.*, to set up a new standard of proper social conduct, creates a new rule of law and is an act purely judicial — in no true sense is it a finding of fact at all — and it is essential that such rulings be carefully scrutinized by the Supreme Court of the United States, lest the public policy of the supreme jurisdiction which has led to the passage of the act be nullified by antagonistic economic conceptions of the inferior jurisdiction in which it must procedurally be enforced.

Consent also differs from voluntary assumption of risk. It is manifestly improper and inaccurate to speak of assumption of risk as an implied consent to receive the harm sustained. One can be properly said to consent to a harm only when he knows that the harm will ensue and intends to suffer it. One voluntarily assuming a risk in practically every case hopes and expects to escape injury. If the maxim *volenti non fit injuria* is to express with any approach to accuracy the principle of voluntary assumption of risk, *volens* must be taken to mean willing to run the risk, not to endure the harm.¹

Yet undoubtedly both of these principles had their root in the same legal conception, the same individualistic view as to the proper province of private law. Where no public interest is at stake, no public harm done or threatened, each individual was and is left free to do what he pleases with his own. The state has no interest in his getting the utmost benefit from his merely private rights. It protects him in his right to do what he pleases with them — so it prohibits their invasion without his consent — it does not attempt to protect him from his own folly in dealing with them. It does not prohibit him from dissipating his resources in any way he pleases, from throwing them away, from destroying them himself, or from consenting to their destruction or impairment by others. Such is the underlying basis of consent.

The same conception logically leads to the somewhat different but cognate principle that as he may give away his private rights, as he may consent to their destruction, so, while risks may not be forced upon him against his will, he may place them in what peril he please, subject them to what risk he chooses, and he who gives him the opportunity to do so is no more guilty of a wrong toward him than he who, with the consent of the owner, takes his property.²

¹ In fact it would seem that the maxim properly understood applies only to consent, for unless the plaintiff wills to receive the particular *damnum*, he can hardly be said to be in any true sense *volens* thereto.

² So far the civil law and common law are at one. At both consent or voluntary assumption of a known risk negatives even *prima facie* liability, but here or thereabouts the civil law appears to have stopped. It is often said by writers on the civil law that it recognized the defense of contributory negligence. Hunter, *Roman Law*, 2 ed., 246-247; Howe, *Studies on the Civil Law*, 206 *et seq.*; Wharton, *Negligence*, 2 ed., § 130. On examination it will be found, however, that the examples on which they base their conclusions are all cases where the injured party voluntarily and without legal right encountered an existing and known, or obvious danger, — as where

This, however, does not account for the defense of contributory negligence. So far there has been a conscious, freely willed destruction or imperilment of a right with which the owner is free to do what he pleases. Contributory negligence goes much further. It throws on the individual the primary burden of protecting his own interest. The courts are the last resort of him who not merely does not, but cannot, protect himself. This conception is part of the very atmosphere of English legal thought, — it is not peculiar in the law of torts to negligence alone, nor is it even confined to the law of torts. The peculiarly common law rule of *caveat emptor* is based upon it. The first distinct statement that "when common prudence and caution of man are sufficient to guard him the law will not protect him in his negligence," is by Lord Kenyon in *Pasley v. Freeman*,¹ an action of deceit. Nor is this to be wondered at. The civil law conception that an individual may do what he pleases with his own is tinged by the peculiarly English characteristics of independence and self-reliance, and so becomes supplemented in the common law by the more intensely individualistic conception that he is also his own first bulwark against outside interference, and that the function of remedial law takes on where the power of self-protection ceases. The civil law appears to go no further than to recognize that the plaintiff is barred from recovery, when at common law he would be held to have assumed the risk,² all beyond this appears to be a peculiarly common law growth.

a slave walking across the Campus Martius was struck by a javelin thrown by a soldier at exercise (D. 9-9-4); where a customer who patronizes a barber having his chair in the market place where people are accustomed to play ball, has his throat cut by reason of a ball striking the barber's arm (D. 9-2-31); and where a man by teasing wild animals causes them to harm him (Sent. Rec. 1-15, § 3).

¹ 3 T. R. 51. See also the very instructive case of *Bailey v. Merrill*, 3 Bulstr. 95 (1659), where a carrier sued in deceit a shipper who had understated the weight of the goods, but, by Dodderidge, J., "Here is plain default in the carrier, he at his peril ought to have looked to this before."

² It is at the point where voluntary assumption of risks shades most nearly into contributory negligence that the civil law most closely approaches this conception. The nearest approach to a recognition by the civil law of contributory negligence in the examples cited by text-writers is the case of a man injured by falling into a trap set for bears or deer, either on a highway or upon a customary path (D. 9-2-28); here it is said that there are many cases found in which the plaintiff was barred if he was able to avoid the peril. This of itself is appropriate either to voluntary risk or to contributory negligence. In the previous sentence it is said, however, that a cause of action arises where there is no notice given and the danger is not known or obvious. "*Si neque denuntiatur est neque scierit aut providere potuerit.*" If *providere* means more than to observe the obvious, this case comes close to a recognition of a

The development in the law of negligence of this idea was necessitated by the enormous growth of protective duties incident upon the extraordinary economic and mechanical changes taking place during the early part of the nineteenth century. A civilization in which the relations between individuals were few and simple, in the course of a few years, was turned into one in which individuals were thrown into a multitude of complex and novel associations. The extent of the social duties of one citizen to another became enormously enlarged. Unless each man was to be regarded as his brother's keeper, unless he was to be unduly burdened with the duty of practically insuring the world against the results of his conduct, it was necessary that the correlative duty of self-protection should be extended as a counterpoise and corrective.¹ It was manifestly unfair that the whole burden of protective caution should be thrown on one of the two parties, or that any man should be required to take better care for others than such persons are bound to take of themselves. The duty of care for others manifestly should be no higher than the duty of self-protection. To hold otherwise would be to unduly burden business and enterprise, to make of those engaged therein the guardians of those apt to be affected by their operation, and at the same time to rob of

duty of precaution. It is indeed difficult to say to which of these two exhibitions of the individualism of remedial law belongs the rule that a man accepts risks not actually known to him, but which are obvious to one using his senses. It is enough to say that in such case the tendency of later common law decisions is to hold that the risk is assumed, not that the plaintiff is barred by his negligence in not discovering the danger (see Day, J., in *McDade v. R. R.*, 191 U. S. 64, 68).

¹ So, while in other fields the extreme individualism of the common law is rapidly giving way, it still persists unimpaired in the law of negligence. In deceit the plaintiff need no longer investigate at his peril the truth of statements made to him. See *Mitchell, J.*, in *Ingalls v. Miller*, 121 Ind. 191; *Cottrill v. Krum*, 100 Mo. 397. See the very late case of *Pearson v. Dublin*, [1907] A. C. 351, where Lord Atkinson intimates (p. 365) that even an express agreement not to rely on the defendant's statements might be void. So also the right of recovery of money paid intentionally, but under some mistake or improper pressure, has been greatly extended. So too the interest of the public, the Commonwealth, in the proper use of natural resources, has led in many instances to an abridgment of a property owner's privilege of doing what he pleases with what he finds therein. Compare *Gagnon v. French Lick Springs*, 163 Ind. 687, and *Forbell v. N. Y.*, 164 N. Y. 522, with *Pickle v. Bradford*, [1895] A. C. 687, and *Chasemore v. Richards*, 7 H. L. Cas. 349. The tendency today is rather toward collectivism — a fuller and fuller recognition of the state as a party having an interest in what until recently were regarded as purely private controversies. But the state's principal interest in enforcing social good conduct is to prevent accidents, the adjusting of the loss therefrom being as yet regarded as primarily a matter of private concern, and this object can best be served by demanding due care from both parties concerned.

self-reliance, and so enervate and emasculate and in effect pauperize the latter by accustoming them to look to others for protection and by removing from them all responsibility for their own safety. To hold that, where the only wrong alleged is the defendant's failure to take care for the plaintiff's safety, the plaintiff's own failure to protect himself debars him from recovery, is but a logical and legitimate extension of the conception underlying consent and voluntary assumption of risk — that the plaintiff can ask from others no higher respect for his rights than he himself pays to them.

If the defendant's wrong be intentional, only consent, express or necessarily implied from the circumstances, will bar recovery. The defendant's intent to cause the harm must be met by the plaintiff's intent to suffer it. If it be an act deliberately done tending to the plaintiff's manifest injury, he must as deliberately subject himself to it. If it be a mere inadvertence, a similar inadvertence will bar his recovery. Logically, therefore, the defense of contributory negligence should apply only when the gist of the alleged wrong is the defendant's failure to take care for the plaintiff's safety. So the unanimous current of decision is that when the defendant's wrong is something more than mere negligence — when it involves an intent to cause harm — contributory negligence is no defense.¹

When all is said, it may well be that in such case the defendant, in the language of the Year Books, "is to be punished for his wrong," — a wrong, in fact, quasi-criminal, not a mere breach of social duty.² While the compensatory feature of the law of tort is that most prominent in modern cases, while it is often asserted that the early punitive aspect has entirely disappeared, there is much that can only be explained by a survival of the earlier conception that private compensation was given as an incident to, or a means

¹ This is not dependent on the form of the action; whether trespass *vi et armis* or case, or whether the injury is direct or indirect, or upon the fact that the defendant's act was conscious and intended; the defendant must not merely intend to act, — his act must be intentionally hostile to the plaintiff, intended to injure him, or at least one done with conscious and reckless indifference to the plaintiff's safety; the act must not be wrongful only in that it was a breach of the defendant's social duty to take care not to expose the plaintiff to unnecessary danger. Compare the difference between conscious ignorance and careless belief in deceit. *Peek v. Derry*, 14 App. Cas. 337.

² See the language of Knowlton, C. J., in *Banks v. Braman*, 188 Mass. 367, where he emphasizes the fact that reckless driving is a criminal offense as well as social misconduct toward those using the highway, and *Sultzberger, J., in Weir v. Haverford Electric Co.*, 64 Leg. Int. (Phila. C. P. No. 2) 4.

for, the punishment of the public wrong.¹ This conception, while it has perhaps survived where it first existed, has rarely been extended. The modern tort recognizing and enforcing social duties is in all its features purely compensatory. The question is not merely whether the defendant ought to pay, but whether the plaintiff ought to receive damages. While the intentional wrongdoer may well be punishable, even though his victim has by his own inadvertence rendered his harm possible or even probable, where the right to recover is based on the idea that one should make good the harm caused by his social delinquencies, and where, as in all cases of contributory negligence, the defendant's delinquency would have caused no harm to the plaintiff save for his own misconduct in not caring for himself, there is no reason that the law should regard one as the delinquent rather than the other. There is no reason to throw upon the one rather than the other the burden of preventing an accident actually preventable by proper care on the part of either, or of answering for the ensuing harm. It is for this reason, and because the law will not aid a plaintiff who having the power and consequent duty to protect himself has failed to do so, and not, as has been seen,² because the defendant's act has by reason of the plaintiff's contributing fault ceased to be a legally proximate cause of the harm suffered, that the defendant is relieved from liability by the plaintiff's contributory negligence.

But it is only where there is equal ability, equal opportunity to avert the harm, that this applies. The law requires impossibilities of no man. When the plaintiff is for any reason impotent to protect himself, the defendant is bound, if he himself be able by care to avoid harming him, to do so; and since the defense of contributory negligence is not punitive in its origin, since the plaintiff is not to be punished for his misconduct by being put outside the protection of the law and made a species of outlaw, a *caput lupis*, it cannot matter that this impotence is due to his own antecedent misconduct.³

¹ See, for a modern tort action almost purely punitive, *Laird v. R. R.*, 166 Pa. St. 4, and see *Holt, C. J.*, in *Ashby v. White*, 2 Ld. Raym. 938, 958. "If such an action (for denying a rightful vote) comes to be tried before me, I will direct the jury to *make him pay well for it*, it is denying him his English right."

² *Ante*, p. 241.

³ So, when the plaintiff by his voluntary intoxication renders himself helpless, it is generally held that the defendant, if he knows the fact, is liable for a subsequent lack of care toward him. *Wheeler v. R. R.*, 70 N. H. 607; *R. R. v. Kreinzer*, 157 Ind. 587; *R. R. v. Townsend*, 69 Ark. 380. At least not by any act to increase his peril. *Black v.*

The decided cases recognize, though they do not expressly formulate, a difference between pre-caution and caution, — taking care in advance to provide against merely probable dangers, and careful action in the face of known peril to oneself or others.¹

If the defendant's only fault is an absence of pre-caution, a like default on the plaintiff's part will debar the latter. If the injury results from a lack of care on both sides, both knowing of the danger and either being able to avert it if he act properly, the plaintiff is equally barred, but a mere failure of antecedent precaution to avoid the danger does not offset a lack of caution when the danger is known. Many of the decisions unnecessarily confuse the subject by treating such lack of care in the face of manifest peril as wanton misconduct equivalent to that intentional wrongdoing to which, as has been seen, contributory negligence is no defense. Wantonness, however, involves a *mens rea*, a conscious mental attitude of complete indifference to the safety of others,² differing ethically but little from a deliberate intent to injure, but entirely distinct from mere carelessness or incompetence, no matter how great. The knowledge of the peril may emphasize the necessity for careful or skilful action, but it cannot of itself make its omission wanton.³

But while the term wanton negligence, equivalent to intentional wrong, is frequently used,⁴ it will be found that in few if any of

R. R., 193 Mass. 448; Bagead v. R. R., 64 N. J. L. 316 (*semble*). *Contra*, Smith v. R. R., 114 N. C. 728; Woods v. Tipton Co., 128 Ind. 289.

¹ This is not a mere difference in degree of proximity, the one being regarded as a mere antecedent condition, the other as the true cause of the harm; for where there is a similar lack of precaution on the defendant's part, and a similar lack of caution on the part of any one other than the plaintiff, the defendant's lack of precaution is regarded as a sufficiently proximate cause of the plaintiff's resulting harm. The difference is one of kind — a difference in the nature of the duty.

² This, of course, can in general be inferred only from the actor's conduct; like all other mental conditions, it must be ascertained by its external manifestations.

³ It is entirely anomalous in the modern tort that the mental attitude of the actor, the *mens rea*, can affect the legal consequence of his act. But such a conception is fundamental in the criminal law. Such decisions as *Banks v. Brame*, 188 Mass. 367, and *Weir v. Electric Co.*, 64. Leg. Int. 4, must be ascribed to a persistence of the early quasi-criminal and punitive aspect of trespass *vi et armis*. In fact, throughout both cases much emphasis was laid upon the fact that the defendant's conduct amounted to criminal negligence. While the distinction is drawn in actions of deceit between reckless assertions made in conscious ignorance of their truth or falsity and statements made in honest though careless belief in their truth, the analogy, though apparently close, is not perfect, for in deceit it is not the intent to defraud which is in question, but the existence of an honest belief.

⁴ See *Alger Smith & Co. v. Duluth Traction Co.*, 93 Minn. 314, and cases cited in *Beach, Contributory Negligence*, § 64, n. 14, and 2 *Cooley, Torts*, 3 ed., 1444, n. 57.

these cases is there any element of conscious recklessness or indifference to the safety of others. The plaintiff's alleged contributory negligence will be found to consist of some antecedent lack of precaution whereby he is exposed to a peril which he is himself powerless to avert. And the defendant's so-called wanton negligence will be found to be a failure in caution for the plaintiff's safety, his peril being perceived.¹ It is only where the defendant's act was antecedent to his discovery of the plaintiff's danger that actual wantonness, conscious indifference to the safety of others, has been insisted upon as an element necessary to the recovery by a plaintiff himself negligent at a latter stage in the transaction, whether his negligence has been a lack of precaution² or caution.³

To sum up, it would appear that the defense of contributory negligence is not a mere application to the particular facts upon which it arises of the rules governing proximity of causation, or of the right of indemnity or contribution between wrongdoers, or the voluntary assumption of a known risk, but is itself a distinct and separate exhibition of the individualism of the common law, which exhibits itself in other fields in the doctrines of consent and voluntary assumption of risk. It debars from recovery, even from an admittedly negligent defendant, one whose own social misconduct has been a concurring proximate cause of his harm. In many jurisdictions there has persisted, in this one particular connection, that conception of legal as distinguished from actual cause which prevailed when the earliest cases on contributory negligence were

¹ Wells, J., in *Murphy v. Deane*, 101 Mass. 455. "In such case [where defendant knows of plaintiff's peril] what would otherwise have been mere negligence may become wanton or wilful wrong." So Judge Cooley says (Torts, 3 ed., 1443, § 811). "If, therefore, the defendant discovered the negligence of the plaintiff in time, by the use of ordinary care, to prevent the injury and did not make use of *such care* for the purpose, he is justly chargeable with reckless injury, and cannot rely on the negligence of the plaintiff as a protection" (see cases cited note 57, p. 1444). Where the plaintiff is a trespasser, some jurisdictions hold that the owner is only bound to refrain from affirmative acts which, while not specifically intended to injure him, contemplate his presence and are consciously directed toward him. *Palmer v. Gordon*, 173 Mass. 46; *Griswold v. R. R.*, 183 Mass. 434; *Magar v. Hammond*, 183 N. Y. 387. But it is to be remembered that the privilege of an owner to conduct himself in his business on his own premises as he pleases without regard to those who without his consent intrude thereon, is of the highest. Mr. Justice Holmes, 7 HARV. L. REV. 4. But in general it may be said that if both the trespasser's peril and helplessness be known the owner is bound to take care that no act of his injures him. *Tanner v. R. R.*, 60 Ala. 621; *Spearen v. R. R.*, 47 Pa. St. 300.

² As in *Banks v. Braman*, 188 Mass. 367.

³ As in *Weir v. Electric Co.*, 64 Leg. Int. 4.

decided, and which has become obsolete in other fields, which regarded the last actor, him whose conduct supplied the final impulse, as the sole responsible cause, and this whether the plaintiff's peril was actually known to the defendant or could have been discovered had he exercised normal care.¹ Nor is it strange that in this one particular class of case this archaic idea continues. The very tendency toward a fuller and more complete measure of responsibility on the part of those guilty of social misconduct which led to the repudiation of the rule in *Vicars v. Wilcocks* where it restricted liability, naturally tended to retain it where its abandonment would have restricted rather than enlarged the liability of a negligent defendant. Then, too, it was difficult in practice to distinguish between the failure to take care where the plaintiff's danger and his inability to help himself was known to the defendant, and the case where the defendant, had he been on the alert, as he should have been, could have discovered it.² Since, admittedly, the defendant was liable in the one case, it was hard to deny the plaintiff relief in the other. And it is submitted that the doctrine of last clear chance goes no further than this. Where the defendant, had he discovered the plaintiff's peril, would be powerless to avert it, even

¹ This the so-called last clear chance doctrine prevails in the following jurisdictions: *Radley v. R. R.*, 1 App. Cas. 754; *Carron v. Cayon*, 9 App. Cas. 873; *Tolson v. R. R. Co.*, 139 U. S. 551; *Ives v. R. R.*, 144 U. S. 408; *R. R. v. Anderom*, 85 Fed. 552; *Frazer v. R. R.*, 81 Ala. 185; *R. R. v. Finley*, 37 Ark. 369; *Meekes v. R. R.*, 56 Cal. 513; *Di Prisco v. R. R.*, 4 Pen. (Del.) 527; *R. R. v. O'Donnell*, 207 Ill. 478; *Traction Co. v. Kidd*, 79 N. E. 347 (Ind.); *Wooster v. R. R.*, 74 Ia. 593; *R. R. v. Hudgins*, 98 S. W. 275 (Ky.); *R. R. v. Armstrong*, 92 Md. 554; *Rapp v. R. R.*, 190 Mo. 144; *Nashua Iron Co. v. R. R.*, 62 N. H. 159; *Nasbert v. R. R.*, 59 S. E. 644 (S. C.); *R. R. v. Few*, 94 Va. 82; *Redford v. R. R.*, 15 Wash. 419. The doctrine is approved in *Austin v. R. R.*, 43 N. Y. 75; *Costello v. R. R.*, 161 N. Y. 317; but in the later cases there is a tendency to apply it only where there are distinct stages in the transaction, and where the defendant's negligence occurs after the second situation has been created by plaintiff's default. *Rider v. R. R.*, 171 N. Y. 146; *McDonald v. R. R.*, 87 N. Y. Supp. 699; *Bortz v. R. R.*, 79 N. Y. Supp. 1046; *Wertzman v. R. R.*, 53 N. Y. Supp. 906.

² See *Batteshill v. Humphries*, 64 Mich. 514, 581, a failure to observe plaintiff's obvious danger is treated as wanton misconduct. See also *R. R. v. O'Donnell*, 207 Ill. 478. But see *Warner v. R. R.*, 141 Pa. St. 615. In Pennsylvania the plaintiff is barred if his misconduct, and the utmost care is required on his part, is in *any way* a cause of his harm. Such qualifying words as "materially," or "directly," used in a charge to the jury have been held to be reversible error. *Monongahela v. Fisher*, 111 Pa. St. 9. It would seem that the plaintiff is barred if his misconduct is a *causa sine qua non* of his injury. *Thane v. Traction Co.*, 191 Pa. St. 249. It is, to say the least, doubtful whether a plaintiff who by his negligence is placed, helpless, in a position of peril can recover against a defendant who perceives both his peril and his helplessness, in the absence of some actually wanton misconduct directed toward him. See, however, *Wynn v. Allard*, 5 Watts & S. (Pa.) 524.

though his inability to save the plaintiff is due to some prior misconduct whereby he has put it out of his power to do so, he is generally held not to be liable for the ensuing harm, nor will it matter which of the two antecedent misconducts, the plaintiff's or the defendant's, was the last in point of time if neither, after the danger is or should be discovered, is capable of averting it.¹

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¹ See *McDuffy v. R. R.*, 79 Fed. 941; *Csatlos v. R. R.*, 75 N. Y. Supp. 583. See also the excellent opinion of Carpenter, J., in *Nashua Iron Co. v. R. R.*, 62 N. H. 159.

THE ORIGIN OF USES AND TRUSTS.

I.

USES.

IN his well-known essay, "Early English Equity,"¹ Mr. Holmes agrees with Mr. Adams,² that the most important contribution of the chancery has been its procedure. But he controverts "the error that its substantive law is merely the product of that procedure," and maintains that "the chancery, in its first establishment at least, did not appear as embodying the superior ethical standards of a comparatively modern state of society correcting the defects of a more archaic system." In support of these views he brings forward as his chief evidence feoffments to uses. He gives a novel and interesting account of the origin of uses, which seems to him to make it plain that "the doctrine of uses is as little the creation of the subpœna, or of decrees requiring personal obedience, as it is an improvement invented in a relatively high state of civilization which the common law was too archaic to deal with."

The acceptance of these conclusions would be difficult for any one who has studied his equity under the guidance of Professor Langdell. Moreover, time has strengthened the conviction of the present writer that the principle "Equity acts upon the person" is, and always has been, the key to the mastery of equity. The difference between the judgment at law and the decree in equity goes to the root of the matter. The law regards chiefly the right of the plaintiff, and gives judgment that he recover the land, debt, or damages because they are his.³ Equity lays the stress upon the duty of the defendant, and decrees that he do or refrain from doing a certain thing because he ought to act or forbear. It is because of this emphasis upon the defendant's duty that equity is

¹ 1 L. Quar. Rev. 162.

² Adams, Equity, Introd. xxxv.

³ In the action of account, although the final judgment is that the plaintiff recover the amount found due by the auditors, the interlocutory judgment, it is true, is personal, that the defendant account (*quod computet*). It is significant that this solitary exception in the common law is a judgment against a fiduciary, a trustee of money who by the award of the auditors is transformed into a debtor.

so much more ethical than law. The difference between the two in this respect appears even in cases of concurrent jurisdiction. The moral standard of the man who commits no breach of contract or tort, or, having committed the one or the other, does his best to restore the *status quo*, is obviously higher than that of the man who breaks his contract or commits a tort and then refuses to do more than make pecuniary compensation for his wrong. It is this higher standard that equity enforces, when the legal remedy of pecuniary compensation would be inadequate, by commanding the defendant to refrain from the commission of a tort or breach of contract, or by compelling him, after the commission of the one or the other, by means of a mandatory injunction, or a decree for specific performance, so called, to make specific reparation for his wrong.

The ethical character of equitable relief is, of course, most pronounced in cases in which equity gives not merely a better remedy than the law gives, but the only remedy. Instances of the exclusive jurisdiction of equity are found among the earliest bills in chancery. For example, bills for the recovery of property got from the plaintiff by the fraud of the defendant;¹ bills for the return of the consideration for a promise which the defendant refuses to perform;² bills for reimbursement for expenses incurred by the plaintiff in reliance upon the defendant's promise, afterwards broken;³ bills by the bailor for the recovery of a chattel from a defendant in possession of it after the death of the bailee.⁴

In most of these cases, it will be seen, the plaintiff is seeking restitution from the defendant, who is trying to enrich himself unconscionably at the expense of the plaintiff. Certainly in these instances of early English equity, chancery was giving effect to an enlightened sense of justice, and in so doing, was supplying the

¹ *Bief v. Dier*, 1 Cal. Ch. XI (1377-1399); *Brampton v. Seymour*, 10 Seld. Soc., Sel. Cas. Ch. No. 2 (1386); *Grymmesby v. Cobham*, *ibid.*, No. 61 (Henry IV?); *Flete v. Lynster*, *ibid.*, No. 119 (1417-1424); *Stonehouse v. Stanshawe*, 1 Cal. Ch. XXIX, (1432-1443).

² *Bernard v. Tamworth*, 10 Seld. Soc., Sel. Cas. Ch. No. 56 (Henry IV?); *Appilgarth v. Sergeantson*, 1 Cal. Ch. XLI (1438); *Gardynor v. Kecke*, 4 The Antiquary 185, s. c. 3 Green Bag 3 (1452-1454).

³ *Wheler v. Huchynden*, 2 Cal. Ch. II (1377-1399); *Wace v. Brasse*, 10 Seld. Soc., Sel. Cas. Ch. No. 40 (1398); *Leinster v. Narborough*, 5 The Antiquary 38, s. c. 3 Green Bag 3 (cited 1480); *James v. Morgan*, 5 The Antiquary 38, s. c. 3 Green Bag 3 (1504-1515).

⁴ *Farendon v. Kelseye*, 10 Seld. Soc., Sel. Cas. Ch. No. 109 (1407-1409); *Harleston v. Caltoft*, 10 Seld. Soc., Sel. Cas. Ch. No. 116 (1413-1417).

defects of the more archaic system of the common law. Nor, although the decrees in these cases are not recorded, can there be any doubt that the equitable relief was given in early times, as in later times, by commanding the obedience of the defendant.¹

Is it possible that what is true of the early equity cases just considered is not also true of the equitable jurisdiction of uses? Let us examine the arguments to the contrary brought forward in the essay upon Early English Equity. Those arguments may be summarized as follows. The feoffee to uses corresponds, point by point, to the *Salman* or *Treuhand* of the early German law. The natural inference that the English feoffee to uses is the German fiduciary transplanted is confirmed by the facts that the continental executor was the *Salman* or *Treuhand* modified by the influence of the Roman law, and that there is no doubt of the identity of the continental executor and the English executor of Glanville's time. Although the *cestui que use* did not have the benefit of the common law possessory actions, he could, if the feoffor, take a covenant from the feoffee, and might, if not the feoffor, have the assistance of the ecclesiastical court. So that for a considerable time both feoffors and other *cestuis que use* were well enough protected. But the ecclesiastical court was not able to deal with uses in the fulness of their later development, and the chancellors carried out as secular judges the principles which their predecessors had striven to enforce in the spiritual courts.

It may be conceded that the feoffee to uses, down to the beginning of the fifteenth century, was the German *Salman* or *Treuhand* under another name. It is common learning, too, that bequests of personality were enforced for centuries by suits against the executors in the ecclesiastical courts. It is possible, although no instance has been found, that devisees of land, devisable by custom in cities and boroughs, at one time proceeded against the executor in the spiritual court.² If this practice ever obtained, it disappeared with

¹ In *Brampton v. Seymour* (1386), *supra*, p. 262, n. 1, in the writ, *Quibusdam certis de causis*, the defendant is ordered "to appear and answer and further to do whatever shall be ordained by us." In *Farendon v. Kelseye* (1407-1409), *ibid.*, n. 4, the decree was that the defendant "should deliver them [title deeds] to him." In *Appilgarth v. Sergeantson* (1438), *ibid.*, n. 2, the prayer of the bill is "to make him do as good faith and conscience will in this part." See similar prayers in *Bernard v. Tamworth* (1399-1413), *ibid.*, n. 2; *Stonehouse v. Stanshawe* (1432-1443), *ibid.*, n. 1.

² In 1 Nich. Britt. 70 n. (f) the annotator, a contemporary of Britton, says that the king has of necessity jurisdiction of customary devisees of land as of a thing annexed to freehold. "For though the spiritual judge had cognizance of such tenements so

the reign of Edward I, the devisee recovering the land devised by a real action in the common law court of the city or borough. That the ecclesiastical court ever gave relief against the feoffee to uses is to the last degree improbable. The suggestion to the contrary¹ is wholly without support in the authorities.² Nor has any case been found in which the feoffor obtained relief against the feoffee to uses on the latter's covenant to perform the use. Such a covenant, it is true, is mentioned in one or two charters of feoffment, but such instances are so rare that the remedy by covenant may fairly be said to have counted for nothing in the development of the doctrine of uses. If, indeed, a feoffment to uses was subject to a condition that the land should revert in the feoffor if the feoffee failed to perform the trust, the feoffor or his heir, upon the breach of this condition subsequent, might enter, or bring an action at common law for the recovery of the land. Only the feoffor or his heir could take advantage of the breach of the condition,³ and the enforcement of the condition was not the enforcement of the use, but of a forfeiture for its non-performance. Moreover, such conditions seem not to have been common in feoffments to uses, the feoffors trusting rather to the fidelity of the feoffees. We find in the books many references to uses of lands, from the latter part of the twelfth to the beginning of the fifteenth century, but no intimation of any right of the intended beneficiary to proceed in court against the feoffee.⁴ But the evidence against such a right is not merely negative. In 1402 a petition to Parliament by the Commons prays for relief against disloyal feoffees to uses because "in such cases there is no remedy unless one be provided by Parlia-

devised, he would have no power of execution, and testament in such cases is in lieu of charter."

¹ Early Eng. Eq., 1 L. Quar. Rev. 168.

² In an undated but early petition, *Horsmonger v. Pympe*, 10 Seld. Soc., Sel. Cas. Ch. No. 123, the *cestui que use* under a feoffment prays that the feoffee to uses be summoned to answer in the King's Chancery, "which is the court of conscience," since he "cannot have remedy by the law of the Holy Church nor by the common law."

³ Y. B., 10 Hen. IV, f. 3, pl. 3.

⁴ In a valuable "Note on the Phrase *ad opus* and the Early History of the Use" in 2 Pollock and Maitland, *Hist. of Eng. Law*, 232 *et seq.*, the reader will find the earliest allusions to uses of land in England. See also Bellewe, *Collusion*, 99 (1385); Y. B., 12 Ed. III (Rolls ed.), 172; Y. B., 44 Ed. III, 25 b. pl. 34; Y. B., 5 Hen. IV, f. 3, pl. 10; Y. B., 7 Hen. IV, f. 20, pl. 1; Y. B., 9 Hen. IV, f. 8, pl. 23; Y. B., 10 Hen. IV, f. 3, pl. 3; Y. B., 11 Hen. IV, f. 52, pl. 30. The earliest statutes relating to uses are 50 Ed. III, c. 6; 1 Rich. II, c. 9; 2 Rich. II, St. 2, c. 3; 15 Rich. II, c. 5; 21 Rich. II, c. 3.

ment."¹ The petition was referred to the King's Council, but what further action was taken upon it we do not know. But from about this time bills in equity became frequent.² It is a reasonable inference that equity gave relief to *cestuis que use* as early as the reign of Henry V (1413-1422), although there seems to be no record of any decree in favor of a *cestui que use* before 1446.³ The first decree for a *cestui que use*, whenever it was given, was the birth of the equitable use in land. Before that first decree there was and could be no doctrine of uses. One might as well talk of the doctrine of gratuitous parol promises in our law of today. The feoffee to uses, so long as his obligation was merely honorary, may properly enough be identified with the German *Salman* or *Treuhand*. But the transformation of the honorary obligation of the feoffee into a legal obligation was a purely English development.⁴

There is no reason to doubt that this development was brought about by the same considerations which moved the chancellor to give relief in the other instances of early equity jurisdiction. The spectacle of feoffees retaining for themselves land which they had received upon the faith of their dealing with it for the benefit of others was too repugnant to the sense of justice of the community to be endured. The common law could give no remedy, for by its principles the feoffee was the absolute owner of the land. A statute might have vested, as the Statute of Uses a century later

¹ 3 Rot. Parl. 511, No. 112.

² The earliest bills of which we have knowledge are the following, arranged in chronological order to the end of the reign of Henry VI: *Godwyne v. Profyt*, 10 Seld. Soc., Sel. Cas. Ch. No. 45 (after 1393); *Holt v. Debenham*, *ibid.*, No. 71 (1396-1403); *Chelmewyke v. Hay*, *ibid.*, No. 72 (1396-1403); *Byngeley v. Grymesby*, *ibid.*, No. 99 (1399-1413); *Whyte v. Whyte*, *ibid.*, No. 100 (1399-1413); *Dodd v. Browing*, 1 Cal. Ch. XIII (1413-1422); *Rothenhale v. Wynchingham*, 2 Cal. Ch. III (1422); *Messynden v. Pierson*, 10 Seld. Soc., Sel. Cas. Ch. No. 117 (1417-1424); *Williamson v. Cook*, *ibid.*, No. 118 (1417-1424); *Huberd v. Brasyer*, 1 Cal. Ch. XXI (1429); *Arundell v. Berkeley*, 1 Cal. Ch. XXXV (1435); *Rous v. FitzGeffrey*, 10 Seld. Soc., Sel. Cas. Ch. No. 138 (1441); *Myrfyne v. Fallan*, 2 Cal. Ch. XXI (1446); *Felubrigge v. Damme and Sealis v. Felbrigge*, 2 Cal. Ch. XXIII and XXVI (1449); *Saundre v. Gaynesford*, 2 Cal. Ch. XXVIII (1451); *Anon.*, *Fitzh. Abr. Subp.*, pl. 19 (1453); *Edlyngton v. Everard*, 2 Cal. Ch. XXXI (1454); *Breggeland v. Calche*, 2 Cal. Ch. XXXVI (1455); *Goold v. Petit*, 2 Cal. Ch. XXXVIII (1457); *Anon.*, Y. B., 37 Hen. VI, f. 35, pl. 23; *Walwine v. Brown*, Y. B., 39 Hen. VI, f. 26, pl. 36; *Furby v. Martyn*, 2 Cal. Ch. XL (1460).

³ *Myrfyne v. Fallan*, 2 Cal. Ch. XXI.

⁴ The beneficiary had no action to compel the performance of the duty of the continental *Salman*. *Schulze*, *Die Langobardische Treuhand*, 145; 1 L. Quar. Rev. 168. *Caillemer*, *L'Exécution Testamentaire*, c. IX, expresses a different opinion. But it is certain that nothing corresponding to the English use was developed on the Continent.

did vest, the legal title in the *cestui que use*. But in the absence of a statute the only remedy for the injustice of disloyal feoffees to uses was to compel them to convey the title to the *cestui que use* or hold it for his benefit. Accordingly the right of the *cestui que trust* was worked out by enforcing the doctrine of personal obedience.¹ It is significant that in the oldest and second oldest abridgments there is no title of "Uses" or "Feffements al uses." In Statham one case of a use is under the title "Conscience" and the others under "Subpena." In Fitzherbert all the cases are under the title "Subpena."²

It must have been all the easier for the chancellor to allow the subpœna against the feoffee to uses because the common law gave a remedy against a fiduciary who had received chattels or money to be delivered to a third person, or, as it was often expressed, to the use³ of a third person, or to be redelivered to the person from whom he had received the chattels or the money. In the case of chattels the bailor could, of course, maintain detinue against a bailee who broke his agreement to redeliver. But the same action was allowed in favor of a third person when the bailment was for his benefit.⁴ So in the case of money the fiduciary was not only liable in account to him who entrusted him with the money, but also to the third person if he received it for the benefit of that person.⁵

¹ The earliest decree that we have directed the defendant to make a conveyance. *Myrfyne v. Fallan*, *supra*, p. 265, n. 2 (1446). See the prayers in the following cases: *Holt v. Debenham*, *ibid.* (1396-1403), "to do what right and good faith demand"; *Byngeley v. Grymesby*, *ibid.* (1399-1413), "answer and do what shall be awarded by the Council"; *White v. White*, *ibid.* (1399-1413), "to restore profits of the land"; *Williamson v. Cook*, *ibid.* (1417-1424), "to oblige and compel defendant to enfeof plaintiff"; *Arundell v. Berkeley*, *ibid.* (1435), "to compel them to make a sufficient and sure estate of said manors to said besecher."

² By the middle of the fifteenth century subpœna was used in the sense of a bill or suit in equity. *Fitzh. Abr. Subp.* 19 (1453), "I shall have a subpena against my feoffee"; *Y. B.*, 37 Hen. VI, f. 35, pl. 23 (1459), "An action of subpena," &c.; *Y. B.*, 39 Hen. VI, f. 26, pl. 36 (1461), "A subpena was brought in chancery."

³ Bailment of chattels to the use of a third person. *Y. B.*, 18 Hen. VI, f. 9, pl. 7. Delivery of money to the use of a third person. *Y. B.*, 33 & 35 Ed. I, 239; *Y. B.*, 36 Hen. VI, f. 9, 10, pl. 5; *Clark's Case*, *Godb.* 210; *Harris v. De Bervoir*, *Cro. Jac.* 687. The count for money had and received by B to the use of A is a familiar illustration of this usage.

⁴ *Y. B.*, 34 Ed. I, 239 (*semble*); *Y. B.*, 39 Ed. III, f. 17 a; *Y. B.*, 3 Hen. VI, f. 43, pl. 20, and several other cases cited in *Ames, Cas. on Trusts*, 2 ed., 52, n. 1.

⁵ *Fitzh. Abr. Acct.* 108 (1359); *Y. B.*, 41 Ed. III, f. 10, pl. 5 (1367); *Bellewe, Acct.* 7 (1379); *Y. B.*, 1 Hen. V, f. 11, pl. 21; *Y. B.*, 36 Hen. VI, f. 9, 10, pl. 5; *Y. B.*,

As the chancellor, in giving effect to uses declared upon a feoffment, followed the analogy of the common law bailment of chattels, or the delivery of money upon the common law trust, so, in enforcing the use growing out of a bargain and sale, he followed another analogy of the common law, that of the sale of a chattel. The purchaser of a chattel, who had paid or become indebted for the purchase money, had an action of detinue against the seller. Similarly the buyer of land who had paid or become a debtor for the price of the land, was given the right of a *cestui que use*. But the use by bargain and sale was not enforced for about a century after the establishment of the use upon a feoffment. In 1506 Rede, J., said: "For the sake of argument I will agree that if one who is seised to his own use sells the land, he shall be said to be a feoffee to the use of the buyer."¹ But Tremeale, J., in the same case dissented vigorously, saying: "I will not agree to what has been said, that, if I sell my land, I straightway upon the bargain and money taken shall be said to be a feoffee to the use of the buyer; for I have never seen that an estate of inheritance may pass from the one seised of it except by due formality of law as by livery or fine or recovery; by a bare bargain I have never seen an inheritance pass." Just how early in the reign of Henry VIII the opinion of Rede, J., prevailed is not clear, but certainly before the Statute of Uses.² Equity could not continue to refuse relief to the buyer of land against a seller who, having the purchase money in his pocket, refused to convey, when under similar circumstances the buyer of a chattel was allowed to sue at law. The principle upon which equity proceeded is well expressed in "A Little Treatise concerning Writs of Subpœna,"³ written shortly after 1523: "There is a maxim in the law that a rent, a common, annuity and such other things as lie not in manual occupation, may not have commencement, nor be granted to none other without writing. And thereupon it followeth, that if a man for a certain sum of money sell another forty pounds of rent yearly, to be perceived of his lands in D, &c., and the buyer, thinking that

18 Ed. IV, f. 23, pl. 5, and several other cases cited in Ames, *Cas. on Trusts*, 2 ed., 4, n. 1, n. 2.

¹ Anon., Y. B., 21 Hen. VII, f. 18, pl. 30.

² Bro. Ab. Feff. al Uses, pl. 54 (1533); Anon., Y. B., 27 Hen. VIII, f. 5, pl. 15 (1536), *per* Shelley, J.; Anon., Y. B., 27 Hen. VIII, f. 8, pl. 27 (1536). See also Bro. Ab. Conscience, pl. 25 (1541); Bro. Ab. Feff. al Uses, pl. 16 (1543).

³ Doct. & St., 18 ed., Appendix, 17; Harg. L. Tr. 334.

the bargain is sufficient, asketh none other, and after he demandeth the rent, and it is denied him, in this case he hath no remedy at the common law for lack of a deed; and thereupon inasmuch as he that sold the rent hath *quid pro quo*, the buyer shall be helped by a subpœna. But if that grant had been made by his mere motion without any recompense, then he to whom the rent was granted should neither have had remedy by the common law nor by subpœna."

The reader will have noted the distinction taken in this quotation between the oral grant for value and the parol gratuitous grant. In the latter case there was neither glaring injustice nor a common law analogy in the treatment of a similar grant of chattels or money to warrant the intervention of equity. Further evidence that equity never enforced gratuitous parol undertakings is to be found in this remark of counsel in 1533: "By Hales, a man cannot change [i. e. create] a use by a covenant¹ which is executed before, as to Covenant to bee seised to the use of W. S. because that W. S. is his cousin; or because that W. S. before gave to him twenty pound, except the twenty pound was given to have the same land. But otherwise of a consideration present or future, for the same purpose, as for one hundred pound paid for the land *tempore conventionis*, or to be paid at a future day, or for to marry his daughter, or the like."² It is evident from these authorities that equity in refusing relief upon gratuitous parol undertakings, or upon promises given only upon a past consideration, was simply following the common law, which regarded all such undertakings or promises as of no legal significance whether relating to land, chattels, or money.

But grants of chattels and money, although gratuitous, were operative at common law, if in the form of instruments under seal. The donee in a deed of gift of chattels could maintain detinue against the donor who withheld possession of them. The grant or promise by deed of a definite amount of money created a legal debt, enforceable originally by an action of debt, and in later times by an action of covenant also.³ If, as we have seen, equity en-

¹ The word covenant was used at this time not in the restricted sense of undertaking under seal, but meant agreement in the widest sense. See 2 HARV. L. REV. 11, n. 1, and also *Wheler v. Huchynden*, 2 Cal. Ch. II; *Wace v. Brasse*, 10 Seld. Soc., Sel. Cas. Ch. No. 40; *Sharrington v. Strotton*, Plowd. 298, *passim*; s. c. Ames, Cas. on Trusts, 2 ed., 109.

² Bro. Ab. Feff. al Uses, 54, March's translation, 95.

³ 2 HARV. L. REV. 56.

forced the use upon a feoffment or sale of land after the analogy of the bailment of a chattel (or trust of money), and the sale of a chattel, why, it may be asked, did not the chancellor create a use in favor of the donee of land by deed of gift after the analogy of the deed of gift of chattels or money? Chancery, it is conceived, might, without any departure from principle, have taken this step and treated every donee of land by deed of grant as a *cestui que use*. But to one who keeps in mind the jealousy with which the common law judges regarded the growing jurisdiction of the chancellor, it is not surprising that for the most part equity declined to enforce gratuitous instruments under seal. There was, however, one class of gratuitous grants of land by deed in which equity created a use in favor of the donee; namely, grants or covenants to stand seised to the use of a blood relation, or of one connected by marriage.¹ These uses are commonly said to arise in consideration of blood or marriage. But consideration in such cases is not used in its normal sense of the equivalent for a promise, but in the general sense of reason or inducement for the agreement to stand seised. The exception in favor of those related by blood or marriage had in truth nothing to do with the doctrine of consideration and was established in the interest of the great English families. The aristocratic nature of this doctrine is disclosed in the following extract from Bacon's Reading on the Statute of Uses:² "I would have one case showed by men learned in the law where there is a deed and yet there needs a consideration . . . and therefore in 8 Reginae [Sharrington v. Strotton, Plowd. 298] it is solemnly argued that a deed should raise an use without any other consideration . . . And yet they say that an use is a nimble and light thing; and now contrariwise, it seemeth to be weightier than anything else; for you cannot weigh it up to raise it, neither by deed nor deed enrolled, without the weight of a consideration. But you shall never find a reason of this to the world's end in the law, but it is a reason of Chancery and it is this: that no court of conscience will enforce *donum gratuitum*, tho' the interest appear never so clearly where it is not executed or sufficiently passed by law; but if money had been paid, and so a person damnified, or that it was for the establishment of his house, then it is a good matter in the Chancery."

¹ Sharrington v. Strotton, Plowd. 298 (1565), was the first case of the kind.

² Rowe's ed., 13, 14; 7 Spedding's Bacon, 1879 ed., 403, 404.

II.

TRUSTS.¹

"The strange doctrine of Tyrrel's Case."² "The object of the legislature appears to have been the annihilation of the common law use. The courts, by a strained construction of the statute, preserved its virtual existence."³ "Perhaps, however, there is not another instance in the books in which the intention of an act of Parliament has been so little attended to."⁴ "This doctrine must have surprised every one who was not sufficiently learned to have lost his common sense."⁵ Such are a few of the many criticisms passed upon the common law judges who decided, in 1557, that a use upon a use was void, and therefore not executed by the Statute of Uses. It has, indeed, come to be common learning that this decision in Tyrrel's Case was due to "the absurd narrowness of the courts of law"; that the liberality of the chancellor at once corrected the error of the judges by supporting the second use as a trust; and "by this means a statute made upon great consideration, introduced in a solemn and pompous manner, has had no other effect than to add at most three words to a conveyance."⁶

This common opinion finds, nevertheless, no support in the old books. On the contrary, they show that the doctrine of Tyrrel's Case was older than the Statute of Uses, — presumably, therefore, a chancery doctrine, — and that the statute so far accomplished its purpose, that for a century there was no such thing as the separate existence in any form of the equitable use in land.

The first of these propositions is proved by a case of the year 1532, four years before the Statute of Uses, in which it was agreed by the Court of Common Bench that "where a rent is reserved, there, though a use be expressed to the use of the donor or lessor, yet this is a consideration that the donee or lessee shall have it for

¹ By the courtesy of the publisher the second part of this article is reprinted from 4 Green Bag 81, in which it first appeared under the title: Tyrrel's Case and Modern Trusts.

² Digby, Prop., 2 ed., 291.

³ Cornish, Uses, 41, 42.

⁴ Sugden, Gilbert, Uses, 347, n. 1.

⁵ Williams, Real Prop., 13 ed., 162.

⁶ Hopkins v. Hopkins, 1 Atk. 591, *per* Lord Hardwicke. See also Leake, Prop. 125; 1 Hayes, Convey., 5 ed., 52; 1 Sanders, Uses, 2 ed., 200; 1 Cruise, Dig., 4 ed., 381; 2 Bl. Comm. 335; 1 Spence, Eq. Jurisp., 490.

his own use ; and the same law where a man sells his land for £20 by indenture, and executes an estate to his own use ; this is a void limitation of the use ; for the law, by the consideration of money, makes the land to be in the vendee."¹ Neither here nor in Benloe's report of Tyrrel's Case² is the reason for the invalidity of the second use fully stated. Nor does Dyer's reason, "because an use cannot be ingendered of an use,"³ enlighten the reader. But in Anderson's report we are told that "the bargain for money implies thereby a use, and the limitation of the other use is merely contrary."⁴ And in another case in the same volume the explanation is even more explicit: "The use is utterly void because by the sale for money the use appears ; and to limit another (although the second use appear by deed) is merely repugnant to the first use, and they cannot stand together."⁵ The second use being then a nullity, both before and after the Statute of Uses, that statute could not execute it, and the common law judges are not justly open to criticism for so deciding.

Nor is there any evidence that the second use received any recognition in chancery before the time of Charles I. Neither Bacon nor Coke intimates in his writings that a use upon a use might be upheld as a trust. Nor is there any such suggestion in the cases which assert the doctrine of Tyrrel's Case.⁶ There is, on the other hand, positive evidence to the contrary. Thus, in Cromp-

¹ Bro. Ab. Feff. al Uses, 40; *ibid.*, 54; Gilb. Uses, 161 *accord*.

² Benl., 1669 ed., 61.

³ Dyer 155, pl. 20.

⁴ 1 And. 37, pl. 96.

⁵ 1 And. 313. See also 2 And. 136, and *Daw v. Newborough*, Comyns, 242: "For the use is only a liberty to take the profits, but two cannot severally take the profits of the same land, therefore there cannot be an use upon an use."

This notion of repugnancy explains also why, in the case of a conveyance to A, to the use of A, to the use of B, the statute does not operate at all. The statute applies only to the chancery use, which necessarily implies a relation between two persons. But A's use in the case put is obviously not such a use, and therefore not executed. The words "to the use of A" mean no more than for the benefit of A. But it is none the less a contradiction in terms to say in the same breath that the conveyance is for the benefit of A and for the use of B. B's repugnant use is therefore not executed by the statute. *Anon.*, Moore 45, pl. 138; *Whetstone v. Bury*, 2 P. Wms. 146; *Atty.-Gen. v. Scott*, Talb. 138; *Doe v. Passingham*, 6 B. & C. 305. The opinion of Sugden to the contrary in his *Treatise on Powers*, 7 ed., 163-165, is vigorously and justly criticized by Prof. James Parsons in his "Essays on Legal Topics," 98.

⁶ Bro. Ab. Feff. al Uses, pl. 54; *Anon.*, Moore 45, pl. 138; *Dillon v. Freine*, Poph. 81; *Stoneley v. Bracebridge*, 1 Leon. 6; *Read v. Nash*, 1 Leon. 148; *Girland v. Sharp*, Cro. Eliz. 382; *Hore v. Dix*, 1 Sid. 26; *Tippin v. Cosin*, Carth. 273.

ton, Courts:¹ "A man for £40 bargains land to a stranger, and the intent was that it should be to the use of the bargainor, and he in this court [chancery] exhibits his bill here, and he cannot be aided here against the feoffment [bargain and sale?] which has a consideration in itself, as Harper, Justice, vouched the case." Harper was judge from 1567 to 1577.

As the modern passive trust, growing out of the use upon a use, is in substance the same thing as the ancient use, it would seem to be forfeitable under the Stat. 33 Henry VIII, c. 20, § 2, by which "uses" are forfeited for treason. Lord Hale was of this opinion, which is followed by Mr. Lewin and other writers. But it was agreed by the judges about the year 1595 that no use could be forfeited at that day except the use of a chattel or lease, "for all uses of freehold are, by Stat. 27 Henry VIII, executed in possession, so no use to be forfeited."² There is also a *dictum* of the Court of Exchequer of the year 1618, based upon a decision five years before, that a trust of a freehold was not forfeitable under the Stat. 33 Henry VIII. Lord Hale and Mr. Lewin find great difficulty in understanding these opinions.³ If, however, the modern passive trust was not known at the time of these opinions, the difficulty disappears; for the freehold trust referred to must then have been a special or active trust, which was always distinct from a use,⁴ and therefore neither executed as such by the Statute of Uses nor forfeitable by Stat. 33 Henry VIII.

In Finch's Case,⁵ in chancery, it was resolved, in 1600, by the two Chief Justices, Chief Baron, and divers other justices, that "if a man make a conveyance, and expresse an use, the party himself or his heirs shall not be received to averre a secret trust, other than the expresse limitation of the use, unless such trust or confidence doe appear in writing, or otherwise declared by some apparent matter." But the trust here referred to was probably the special or active trust, and not the passive trust. The probability becomes nearly a certainty in the light of the remark of Walter, *arguendo*,

¹ F. 54, a; s. c. Cary 19, where the reporter adds: "And such a consideration in an indenture of bargain and sale seemeth not to be examinable, except fraud be objected, because it is an estoppel."

² 1 And. 294.

³ Lewin, *Trusts*, 8 ed., 819.

⁴ Bacon, *Stat. of Uses*, Rowe's ed., 8, 9, 30; 1 Sanders, *Uses*, 5 ed., 2, 3; 1 Coke 139 b, 140 a.

⁵ Fourth Inst. 86.

twenty years later, in *Reynell v. Peacock*.¹ "A bargain and sale and demise may be upon a secret trust, but not upon a use." And the case of *Holloway v. Pollard*² is almost a demonstration that the modern passive trust was not established in 1605. This was a case in chancery before Lord Chancellor Ellesmere, and the defendant failed because his claim was nothing but a use upon a use.

Mr. Spence and Mr. Digby cite the following remark of Coke in *Forod v. Hoskins*,³ as showing that chancery had taken jurisdiction of the use upon a use as early as 1615: "If *cestuy que use* desires the *feoffees* to make an estate over and they so to do refuse, for this refusal an action on the case lieth not, because for this he hath his proper remedy by a subpœna in Chancery." "It seems," says Mr. Digby, "that this could only apply to a use upon a use."⁴ But if the *cestuy que use* here referred to were the second *cestuy*, he would not proceed against the *feoffees*, for the Statute of Uses would have already transferred the legal estate from them to the first *cestuy*. It would seem that Coke was merely referring to the old and familiar relation of *cestuy que use* and *feoffees* to use as an analogy for the case before him, which was an action on the case by a copy-holder against the lord for not admitting him.

The earliest reported instance in which a use upon a use was supported as a trust seems to have been *Sambach v. Dalton*, in 1634, thus briefly reported in *Tothill*:⁵ "Because one use cannot be raised out of another, yet ordered, and the defendant ordered to passe according to the intent." The conveyance in this case was probably gratuitous. For in the "Compleat Attorney," published in 1666, this distinction is taken: "If I, without any consideration, bargain and sell my land by indenture, to one and his heirs, to the use of another and his heirs (which is a use upon a use), it seems the court will order this. But if it was in consideration of money by him paid, here (it seems) the express use is void, both in law and equity."⁶ On the next page of this same book the facts of *Tyrrel's Case* are summarized with the addition: "Nor is there, as it seems, any relief for her [the second *cestuy que use*] in this court in a way of equity, because of the considera-

¹ 2 Rolle 105. See also *Crompton, Courts*, 58, 59.

² Moore 761, pl. 1054.

³ 2 Bulstr. 336, 337.

⁴ Digby, *Prop.*, 3 ed., 328. See 1 Spence, *Eq. Jurisp.*, 491.

⁵ Page 188; s. c. *Shep. Touch.* 507.

⁶ Page 265. Compare also pages 507 and 510 of *Shep. Touch.*

tion paid; but if there was no consideration, on the contrary, Tothill, 188." As late as 1668, in *Ash v. Gallen*,¹ a chancery case, it was thought to be a debatable question whether on a bargain and sale for money to A to the use of B, a trust would arise for B. Even in the eighteenth century, nearly two hundred years, that is, after the Statute of Uses, Chief Baron Gilbert states the general rule that a bargain and sale to A to the use of B gives B a chancery trust with this qualification: "*Quære tamen*, if the consideration moves from A."²

In the light of the preceding authorities, Lord Hardwicke's oft quoted remark that the Statute of Uses had no other effect than to add three words to a conveyance must be admitted to be misleading. Lord Hardwicke himself, some thirty years afterwards, in *Buckinghamshire v. Drury*,³ put the matter much more justly: "As property stood at the time of the statute, personal estate was of little or trifling value; copyholds had hardly then acquired their full strength, trusts of estates in land did not arise till many years after (I wonder how they ever happened to do so)." The modern passive trust seems to have arisen for substantially the same reasons which gave rise to the ancient use. The spectacle of one retaining for himself a legal title, which he had received on the faith that he would hold it for the benefit of another, was so shocking to the sense of natural justice that the chancellor at length compelled the faithless legal owner to perform his agreement.

James Barr Ames.

¹ 1 Ch. Cas. 114.

² Gilbert, *Uses*, 162. But in 1700 the limitation of a use upon a use seems to have been one of the regular modes of creating a trust. *Symson v. Turner*, 1 Eq. Cas. Abr. 383. The novelty of the doctrine is indicated, however, by the fact that, even in 1715, in *Daw v. Newborough*, Comyns 242, the court, after saying that the case was one of a use upon a use, which was not allowed by the rules of law, thought it worth while to add: "But it is now allowed by way of trust in a court of equity."

³ 2 Eden 65.

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EDWARD HENRY STROBEL, Bemis Professor of Law at the Harvard Law School from 1898 to 1906, died in Bangkok, Siam, on January 15, 1908, at the age of fifty-two. The career of Professor Strobel was of marked brilliancy and of exceptional interest. He graduated from Harvard College in 1877 and from the Law School in 1882. After practicing law for three years, he became secretary to the United States Legation at Madrid, which position he held for five years. In 1893 and 1894 he served as Third Assistant Secretary of State. Thereafter he became successively Minister to Ecuador and to Chili and served as arbitrator of the Ferrant claim between France and Chili. In 1898 he became Professor of International Law. In 1903 Professor Strobel entered the service of the King of Siam as legal adviser, and three years later he resigned his professorship in order to assume that office permanently. In June of 1906 the degree of LL.D. was conferred on him by his college in recognition of his ability and distinguished services abroad. His death will be deeply felt by those who were in any way brought in contact with him.

THE EFFECT OF DISCHARGE IN BANKRUPTCY ON ASSIGNMENTS OF FUTURE EARNINGS. — It rests in the nature of things that there can be no "title" to non-existent property. Nevertheless, where future property, if it come into existence at all, must come as the product of something presently owned, our law has, in certain instances, imputed to the owner a potential posses-

sion of the non-existent property, which possession is conceived to be subject to present transfer.¹ The right of the assignee of a non-existent chose in action has sometimes been confused with that of the purchaser of such future property. His right, however, rests on an entirely different basis. The earlier common law even refused to give effect to assignments of existing contractual rights. Eventually the rights of such assignor and assignee were worked out on the principle of an irrevocable agency in the latter to collect and retain to his own use the obligation owed to the assignor.² This doctrine has marked theoretical and practical advantages, but it is to be observed that it makes possible the effectual "assignment" of a right not yet in being, without imposing even the limitations of the fiction of potential possession. However, the courts, apparently impressed by the fact that public policy is opposed to permitting one to mortgage himself too far into the future, have declined to give effect to assignments of future wages unless to be earned in an employment existing at the time of assignment.³ This subject has been brought into some prominence by a recent conflict of authority. When an assignment of wages to be earned under an existing employment is given as security for a loan, and the assignor thereafter receives his discharge in bankruptcy, the question arises whether or not the assignee may collect wages earned by the assignor after the discharge. It has been held⁴ that the assignee had, at the time of bankruptcy, a valid lien on the future wages, which is preserved by the Bankruptcy Act.⁵ The three other cases⁶ dealing with the problem hold that such an assignee can have no lien until the wages have been earned, and therefore that at the time of discharge there is no valid lien to be preserved. The Supreme Court of Massachusetts has recently held that such an assignment operated to transfer potential possession of the wages to be earned after bankruptcy, and that the assignee therefore had, at the time of the discharge, a valid lien. *Citizens' Loan Ass'n v. Boston, etc., R. R. Co.*, 82 N. E. 696.

All of these cases seem to overlook the nature of the so-called "assignment" of choses in action. A power of attorney to collect wages which may chance to be earned in the future, cannot with propriety be spoken of as a lien, even though given as security for a present obligation. On the other hand, there appears to be no provision in the Bankruptcy Act which can operate to disturb this agency of the assignee. Indeed, it is recognized that such powers of attorney to collect choses in action which were in existence before the bankruptcy, survive the discharge.⁷ It seems to follow that such a power of attorney must equally be effectual to permit the assignee to collect the bankrupt's after-acquired choses in action. The weight of the objection to this rule founds itself on "the spirit of the bankruptcy laws." Undoubtedly the dominant purpose of such enactments is to appropriate the whole of the debtor's present property to the payment of his debts and to permit him to retain his future earnings as against former creditors.⁸

¹ *Grantham v. Hawley*, Hob. 132; *Hull v. Hull*, 48 Conn. 250.

² See Prof. Ames in 3 HARV. L. REV. 337 *et seq.*

³ *Herbert v. Bronson*, 125 Mass. 475. See *Kane v. Clough*, 36 Mich. 436; *Garland v. Harrington*, 51 N. H. 409.

⁴ *Mallin v. Wenham*, 209 Ill. 252, 258.

⁵ Bankruptcy Act, § 67 *d*, 30 Stat. at L. 564.

⁶ *In re West*, 128 Fed. 205; *In re Home Discount Co.*, 147 Fed. 538, 547; *Leitch v. Northern Pacific Ry. Co.*, 95 Minn. 35.

⁷ *Stedman v. Gassett*, 18 Vt. 346; *Hayes v. Pike*, 17 N. H. 564. Cf. *In re Oliver*, 132 Fed. 588.

⁸ See 2 Bl. Comm. 471, 472.

Since the present Act fails to provide for the extinction of such powers to collect after-acquired rights of action, that object seems not to have been entirely secured.

JUDICIAL RESTRICTIONS ON THE LEGISLATIVE POWER OF TAXATION. — It is well settled by the courts, both state and federal, that taxation must be for public purposes.¹ In some cases this conclusion is based on express or implied constitutional provisions.² But in a number of leading cases it is not so based.³ It is there drawn from question-begging theories of the nature of legislation, from supposed implied reservations of private rights in the so-called social compact made at the establishment of government, and even from the common dictionary definition of taxation. These sources are clearly questionable. It seems, however, that the doctrine of these cases was established, not on account of its constitutional or logical necessity, but because it was very desirable and because the courts, being regarded as guardians of private rights even when not secured by constitutional provisions, were ready to declare unconstitutional statutes infringing such latent rights. In the assumption of such power the courts seem to have encroached on the functions of the legislature by defining without constitutional requirement the purposes for which it seems wise or politic to tax.

After establishing the public purposes of taxation, whether properly by force of a constitutional provision or improperly by encroaching on the powers of the legislature, courts further usurp legislative prerogatives by refusing to declare taxing acts public, the purposes of which do not fall within a restricted and artificial definition.⁴ This usurpation affects all legislative taxing acts for purposes lying between the restricted definition and the reasonable and liberal definition which the legislature should be allowed to follow. To justify the courts in declaring a tax void, the absence of all possible public interest should be so clear that no reasonable man could consider it promotive of the public welfare.⁵ If such taxation is unjust or excessive, the only security for correction is the legislative body.⁶ Ultimately the responsibility will rest where it ought, — on the electors. This seems good politics and, moreover, respects our tripartite form of government.

A class of cases involving these principles are the decisions as to the constitutionality of state acts taxing insurance companies for the benefit of disabled firemen. When applying only to foreign insurance companies, such statutes have been sustained as police regulations.⁷ But other cases have more correctly held that, as the revenue purpose is more important than the regulative, the imposition is a tax.⁸ As a tax, it has been held invalid as offending not only against specific constitutional provisions, but against the

¹ *Cole v. La Grange*, 113 U. S. 1.

² *Lowell v. Boston*, 111 Mass. 454, 461; *Trustees v. Boone*, 93 N. Y. 313.

³ *Loan Ass'n v. Topeka*, 20 Wall. (U. S.) 655; *Calder v. Bull*, 3 Dall. (U. S.) 386, 387.

⁴ See 12 HARV. L. REV. 499; *Phila. Ass'n v. Wood*, 39 Pa. St. 73.

⁵ *City of Minneapolis v. Janney*, 86 Minn. 111; *Broadhead v. Milwaukee*, 19 Wis. 624.

⁶ See *Bank v. Billings*, 4 Pet. (U. S.) 514, 563.

⁷ *Trustees v. Boone*, *supra*; *Fire Dept. v. Helfenstein*, 16 Wis. 136.

⁸ See *Phoenix Assurance Co. v. Fire Dept.*, 117 Ala. 631; *San Francisco v. Ins. Co.*, 74 Cal. 113; *State v. Merch. Ins. Co.*, 12 La. Ann. 802; *Firemen's Benev. Ass'n v. Lounsbury*, 21 Ill. 511; *Henderson v. London, etc., Co.*, 135 Ind. 23; *State v. Wheeler*, 33 Neb. 563.

latent rights and reservations above mentioned.⁹ On the other hand, it has been held valid, as well under the most liberal conception of the legislative power of taxation as under the requirement of public purposes.¹⁰ A recent South Carolina case regards such a tax as not for public purposes and consequently invalid. *Aetna Fire Insurance Co. v. Jones*, 59 S. E. 148. Had the court followed the Alabama case,¹¹ which it misconceived and which seems the most satisfactory case on this subject, the statute would have been considered within the powers of the legislature. For it is clear that there is the possibility that such a tax promotes the public welfare. It is not, therefore, a question of right for the courts, but a question of policy for the legislature.

INEFFECTUAL CHANGE OF THE BENEFICIARIES OF MUTUAL BENEFIT CERTIFICATES. — Upon the death of a member of a mutual benefit association who has made an ineffectual change of beneficiaries, the problem is presented whether the proceeds should be paid to the original beneficiary or to the persons designated by the society's rules or by statute to receive them if no beneficiary is named. The attempted change may be ineffectual because the second beneficiary is incapable of taking by the rules of the society or by statute, or because of failure to comply with the prescribed formalities. It should be noted that compliance with the formalities is not always necessary for an effectual change; for before the member's death the society can waive such compliance and complete the change, and the original beneficiary cannot object, since, unlike the beneficiary of an ordinary insurance policy, his rights vest only on the member's death.¹ If, however, the change is ineffectual for any reason, the important question then is, whether or not the act done operated as a revocation of the original designation. If the change attempted was in the nature of an assignment or one which, if ineffectual, leaves the original obligation payable on its face to the first beneficiary, the general rule is that he may recover.² There may, however, be grounds for equitable interference. If the cause of the invalidity of the change is attributable to the first beneficiary, he will not be allowed to profit by his own wrong, and the proceeds will be paid as though the change had been accomplished. The same result may be reached if the insured did all in his power to make the change but was prevented by death or because the conditions were impossible of performance.³ Unless some such exceptional case exists, the fact that the original designation has never been properly revoked will protect the first beneficiary.

If, however, there has been a sufficient revocation of the original designation, the rights of the first beneficiary are completely destroyed. A contrary result, it is true, has been reached in several cases which hold that although the original certificate was surrendered and a new one issued, as the second

⁹ *Phila. Ass'n v. Wood*, *supra*; *San Francisco v. Ins. Co.*, *supra*; *State v. Wheeler*, *supra*.

¹⁰ *Firemen's Benev. Ass'n v. Lounsbury*, *supra*; *Phoenix Assurance Co. v. Fire Dept.*, *supra*.

¹¹ *Phoenix Assurance Co. v. Fire Dept.*, *supra*.

¹ *Titsworth v. Titsworth*, 40 Kan. 571. Cf. *McLaughlin v. McLaughlin*, 104 Cal. 171.

² *Elsev v. Odd Fellows', etc., Ass'n*, 142 Mass. 224.

³ *Grand Lodge v. Child*, 70 Mich. 163. See 16 HARV. L. REV. 67.

was invalid, the beneficiary named in the first should recover.⁴ This result, however, seems unsound. Since a certificate may be surrendered or revoked without a new beneficiary being named,⁵ it would seem that when the revocation is once complete all the beneficiaries' rights are forever extinguished, and the issue of any later certificate, whether invalid or not, is immaterial. A recent case reaches this result, holding that when the new certificate is invalid the proceeds should be distributed as though no designation had ever been made. *Grand Lodge, etc., v. Mackey*, 104 S. W. 907 (Tex., Civ. App.).⁶ The only possible theory on which a contrary result can be justified is on analogy to the law of dependent relative revocation of wills, where, in certain cases, when an attempt is made to substitute an invalid gift for a valid one, the court will set aside the revocation and allow the old gift to stand. But the better view in such cases is that if the revocation is not really conditional, but absolute, although made because of the desire to change the legatee, the old gift will not be revived unless that result is clearly the intent of the testator.⁷ If equity would interfere only in cases where such proof is made, little objection could be made to an extension of the doctrine to the revocation of mutual benefit certificates. For the indiscriminate interference which has confused the law of both subjects there can be no excuse.

CONFLICTING RECEIVERSHIPS. — Recently New Jersey creditors of a New York corporation secured the appointment of receivers for its property by the federal circuit court. Shortly thereafter, the attorney-general of New York instituted proceedings in the state courts to dissolve the corporation, pursuant to statute, because it had been insolvent for a year; and moved for the appointment of receivers for its property, as permitted by statute in such proceedings. The court, following Mr. Alderson's work on Receivers, granted the motion, but, though it believed its receivers entitled to possession, instructed them in deference to a spirit of comity not to molest the federal receivers, and to request the federal court to relinquish control. *People v. N. Y. City Ry.*, 107 N. Y. Supp. 247. The moderate form of this decree reaches a proper result,¹ but it is believed that the attitude of the court was wrong both in its reasoning and on authority. The inviolability of property in the hands of a receiver appointed by a court of competent jurisdiction is well settled.² In the present case the court admitted that there were facts sufficient to give either state or federal court jurisdiction, and that when two courts have concurrent jurisdiction of a controversy, the assumption of jurisdiction by one court excludes the other. It went on, however, to quote a dictum of Mr. Justice Bradley: "But where the objects of the suits are different, this rule does not apply, although the thing about or in reference to which the litigation is had is the same in both cases."³ It then pointed out that the suit in the federal court was to continue the exist-

⁴ *Grace v. N. W., etc.*, Ass'n, 87 Wis. 562; *Smith v. B. & M., etc.*, Ass'n, 168 Mass. 213.

⁵ *Cullin v. Knights of Maccabees*, 77 Hun (N. Y.) 6.

⁶ *Accord, Carson v. Vicksburg Bank*, 75 Miss. 167.

⁷ See *Tupper v. Tupper*, 1 Kay & J. 665.

¹ *State v. Port Royal, etc., Ry.*, 23 S. E. 363, 368; aff. 45 S. C. 413; *ibid.* 470.

² *In re Tyler*, 149 U. S. 164; *O'Mahoney v. Belmont*, 62 N. Y. 133, 149. See 17 HARV. L. REV. 196.

³ *Wilmer v. Atlantic, etc., Ry.*, 2 Woods (U. S.) 409, 425.

ence of the corporation, while that in the state court was to terminate it. Therefore, the court argued, this case came within the exception and not the rule, and consequently the federal court's jurisdiction of the property was not exclusive. The reading of the entire decision from which the court quoted demonstrates that it completely misunderstood and misused the words it borrowed. There the question before the state court was the validity of a sale, and that before the federal court the rights of bondholders. When the federal court discovered that the state receivership was prior in time, it refused a writ of assistance to its own receiver. After laying down the rule and exception above stated, it pointed out that since the questions before the courts were different, there was no conflict of jurisdiction as to the question, and both suits could go on. Then it proceeded to show that as to the *res* there was a conflict, and decided that the court first getting jurisdiction over that could keep it. The distinction between conflict of jurisdiction as to the question and as to the *res*, which here escaped the New York court, has frequently been taken.⁴ It is undoubtedly established that the court first acquiring jurisdiction over the *res* draws to itself the exclusive right to dispose of it for the purposes of the litigation then before it.⁵ Even willingness of the receiver to surrender the *res* is immaterial,⁶ since the property in fact is in the hands of the court. The courts say that where either state or federal court appoints a receiver, the result as to the other is as if the *res* were removed to another territorial sovereignty.⁷

Another argument of the court in support of its view was that, since the corporation is the creature of the state, the federal court by appointing a receiver cannot prevent the state from dissolving it. As already shown, the state may proceed with its dissolution suit, since that is different from the suit before the federal court. The possession of the property of the corporation may be desirable in such a proceeding, but it is not necessary. The inconvenience thus resulting is merely one of the many attendant upon divided jurisdiction. Furthermore, the court is not supported by the cases cited, except one passing dictum.⁸ In fact, unnoticed by the court there is authority opposed to its contention.⁹

RIGHTS OF SECURED CREDITORS UPON INSOLVENCY OF THE DEBTOR OR HIS ESTATE. — The rights of a secured creditor against an insolvent debtor may be adjusted in one of two ways: either he may be required first to exhaust his security and credit the proceeds on his claim; or he may be allowed to recover a dividend on his full claim and resort to his security for

⁴ *De La Vergne, etc., Co. v. Palmetto, etc., Co.*, 72 Fed. 579; *Metropolitan Trust Co. v. Lake, etc., Ry.*, 100 Fed. 897.

⁵ *Shields v. Coleman*, 157 U. S. 168; *Mil. & St. P. R. R. v. Mil. & Minn. R. R.*, 20 Wis. 165. This principle is also applied in analogous cases: property in receiver's hands subject to a maritime lien cannot be disturbed. See *Moran v. Sturges*, 154 U. S. 256; nor taken by eminent domain, *Western, etc., Co. v. Atlantic, etc., Co.*, 7 Miss. (U. S.) 367. See also *Heidritter v. Elizabeth, etc., Co.*, 112 U. S. 294; *State v. Marietta, etc., R. R.*, 35 Oh. St. 154.

⁶ *The E. L. Cain*, 45 Fed. 367.

⁷ *In re Tyler*, *supra*, 186; *The E. L. Cain*, *supra*, 369.

⁸ *Petition of Kittanning Ins. Co.*, 146 Pa. St. 102, 105.

⁹ *Lake, etc., Co. v. Brown, etc., Co.*, 44 Fed. 539, *aff. sub nom. Leadville Coal Co. v. McCreery*, 141 U. S. 475; *Mercantile Trust Co. v. Missouri, etc., Ry.*, 48 Fed. 351. The federal receiver is not even a necessary party to the state's dissolution suit. *City Water Co. v. Texas*, 88 Tex. 600.

the balance. The former was the rule early adopted in bankruptcy proceedings,¹ and is the rule prescribed by the National Bankruptcy Act.² But this rule has been considered by most courts as purely statutory and, apart from bankruptcy proceedings, has received slight recognition. On principle it is inequitable, since it deprives the secured creditor of the advantages over unsecured creditors which the debtor had agreed to give him.³ The courts have accordingly refused to follow the bankruptcy rule in cases of assignment for the benefit of creditors. The decisions almost universally hold that in such proceedings the secured creditor may recover a *pro rata* share on his whole claim without first resorting to his security.⁴ But there is some conflict as to whether or not the secured creditor will be required to credit as payments on the debt any sums received from his security after the assignment and before disbursement. It is clear that if the creditor realizes on his security before insolvency he thereby voluntarily relinquishes one of his rights, and only the claim for the debt due at insolvency remains. But whether or not recoveries after assignment and before proof, or after proof and before disbursement, must be credited as payments, depends on the time at which the interest of the secured creditor to a *pro rata* share on his full claim becomes fixed — at the date of assignment, of proof of claim, or of disbursement. The correct view seems to be that the right of the creditor becomes fixed at the date of the assignment.⁵ For by the assignment the assignee becomes a trustee of the assets for the benefit of the creditors, each of whom acquires a joint equitable ownership in the assets in proportion to the amount of his claim.⁶ The creditor therefore proceeds against the assignee by virtue of his beneficial interest in the trust fund, and any recovery from his security after the assignment cannot prejudice his rights as equitable owner.

A more unsettled problem is presented in the case of an insolvent estate of a deceased debtor. The Supreme Court of Hawaii has recently decided that the right of a secured creditor against such an estate does not become fixed until disbursement, and consequently any sum realized on the security before that time must be credited on the debt. *Estate of Lavinia Kapu*, Sept. 10, 1907. The decision is in accordance with the weight of authority in this country,⁷ but is difficult to support on principle. It is true, the administrator of the decedent is not, like the assignee, a trustee,⁸ and the creditors do not therefore acquire an equitable ownership in the estate on the death of the debtor. But the secured creditor has his double security, and is entitled to proceed against both his debtor and his security and to make the most of both remedies.⁹ Furthermore, when the debt is proved and allowed it should become fixed for the purpose of declaring dividends thereon, as the entry of allowance has the force and effect of a judgment.¹⁰ The present decision seems fallacious in treating the claim of the creditor to share in the assets of the debtor and his debt against the debtor as if they

¹ *Wiseman v. Carbonell*, 1 Eq. Cas. Abr. 312.

² 30 Stat. at L. 560.

³ See *People v. Remington*, 121 N. Y. 328.

⁴ *Bank v. Haug*, 82 Mich. 607; *contra*, *Union Bank v. Mechanics' Bank*, 80 Md. 371.

⁵ *Morris v. Olwine*, 22 Pa. St. 441.

⁶ *Allen v. Danielson*, 15 R. I. 480.

⁷ *Jamison v. Adler-Goldman Commission Co.*, 59 Ark. 548; *Erle v. Lane*, 22 Col. 273.

⁸ See *Johnson v. Lawrence*, 95 N. Y. 154. But see *Hess's Estate*, 69 Pa. St. 272.

⁹ *Mason v. Bogg*, 2 Myl. & C. 443; *Furness v. Bank*, 147 Ill. 570.

¹⁰ *Mitchell v. Mayo*, 16 Ill. 83; 2 *Woerner, Administration*, § 392.

were identical,¹¹ and to allow the secured creditor to recover his *pro rata* share on his debt as it existed at the time of the proof and allowance of his claim seems a sounder rule.

VALIDITY OF STATE BONDS REDEEMED BEFORE MATURITY AND THEREAFTER ILLEGALLY PUT INTO CIRCULATION. — A peculiar situation arises when a negotiable instrument lawfully issued by a government and redeemed before maturity, but not destroyed or cancelled,¹ is later stolen and comes into the hands of a holder in due course. In the case of ordinary negotiable paper originally valid, a holder in due course has full title unaffected by previous payment² or voluntary reissue³ on the part of the original obligor. Moreover, securities issued and redeemed by an individual,⁴ a private corporation,⁵ or a school district,⁶ and without the consent of the maker put into circulation again before maturity, have been held valid, on the ground that the maker must suffer for his lack of diligence in failing to destroy the instrument. This rule should also apply to state bonds,⁷ for when a sovereign government undertakes to deal in commercial paper, it assumes the ordinary commercial responsibilities;⁸ indeed, it is to the interest of a borrowing state that *bona fide* purchasers of its paper should be protected. But the holder in due course of a Virginia bond which had been redeemed and stolen from the treasury, was considered to have no claim against the state,⁹ because, it was said, surrender extinguishes the vitality of such an instrument,¹⁰ delivery is essential to execution,¹¹ and there was no valid redelivery. Even where this theory that redemption involves extinction is plainly inapplicable, as in the case of public securities called in to be kept as a special fund, the state, having the power to abrogate the law merchant provided no vested right be impaired, may, while holding such securities, declare them void and thereby destroy forever the negotiability without changing the actual appearance of the paper.¹² the public records in such case give sufficient notice to avoid estoppel by recitals or negligence. Accordingly, it might be argued that a taker of state bonds has constructive notice of previous legislation providing for redemption before maturity,

¹¹ See *Merrill v. Nat'l Bank*, 173 U. S. 131.

¹ If the cancellation is erased, it is void, according to the stricter view, on account of the material alteration, apart from statute. *District of Columbia v. Cornell*, 130 U. S. 655. But see *Knight v. Lanfear*, 7 Rob. (La.) 172.

² *Burbridge v. Manners*, 3 Campb. 193.

³ *Morley v. Culverwell*, 7 M. & W. 174. *Contra*, *Beebe v. Real Estate Bank*, 4 Ark. 546.

⁴ *Ingham v. Primrose*, 7 C. B. (N. S.) 82. The tearing of the bill in half was not there a cancellation.

⁵ *Rockville Nat'l Bank v. Citizens' Gaslight Co.*, 72 Conn. 576.

⁶ *Fogg v. School District*, 75 Mo. App. 159. *Contra*, *Board v. Sinton*, 41 Oh. St. 504.

⁷ *Cf. California v. Wells, Fargo & Co.*, 15 Cal. 336.

⁸ *United States v. Barker*, 12 Wheat. (U. S.) 559.

⁹ *Branch v. Commissioners*, 80 Va. 427.

¹⁰ *Cf. Bardsley v. Sternberg*, 17 Wash. 243.

¹¹ *Germania Savings Bank v. Suspension Bridge*, 73 Hun (N. Y.) 590. *Contra. Cooke v. United States*, 91 U. S. 389; *Worcester, etc., Bank v. Dorchester, etc., Bank*, 10 Cush. (Mass.) 488. But these were cases respectively of treasury notes and bank bills, which may be deemed more in the nature of currency.

¹² *Pugh v. Moore*, 44 La. Ann. 209.

though not apparent on the face of the instrument, and is thereby put on his guard, and therefore becomes subject to the defense of previous redemption. Another possible argument is that a redeemed public security cannot be again redeemable if thereby the lawful limit of indebtedness would be exceeded.¹² This objection, however, would hardly arise under a constitution which expressly permits securities to be issued for the redemption of "evidence of indebtedness."

Recently in South Carolina, where such a constitutional provision exists,¹⁴ bonds were issued under a statute which provided that the bonds might be exchanged before maturity for certificates, and that redeemed paper was to be recorded, cancelled, and destroyed. It was held by the Supreme Court of South Carolina that the holder in due course of one of these bonds, which had been redeemed and stolen from the treasury before cancellation, could by *mandamus* compel the state treasurer to redeem the bond a second time. *Ehrlich v. Jennings*, 58 S. E. 922. Here the reference to the statute on the face of the bond notified the taker of its redeemability; but he had a right also to infer from the statute that no redeemed bond would escape destruction. The majority of the court adopts the better doctrine that a government security may be valid, though redeemed and unlawfully reissued. In this particular case, however, a contrary result might well have been reached, on the ground that the holder of the bond by bringing *mandamus* under the funding statute, submits to the grace of that statute,¹⁵ and his rights depend not on the law of negotiable instruments, but on the question whether the legislature intended that bonds such as his should be refunded.

ASSUMPSIT TO COLLECT A TAX. — Statutes creating new taxes generally provide a remedy for non-payment by giving the state or collector the right to distrain or sell the property taxed, or by imposing a fine. Where the statute provides no remedy, or the remedy provided is for some reason ineffectual, the question arises whether the state or collector may bring *assumpsit* to collect the tax. The answer depends on the fundamental nature of a tax. Clearly it is not a debt;¹ for it does not arise from any contractual relation, express or implied. Nor has a tax any of the incidents of a debt: it does not draw interest;² is not subject to attachment;³ is not available as a set-off;⁴ cannot be proved in bankruptcy;⁵ and is not assignable.⁶ Similarly a statute doing away with imprisonment for debt does not prevent arrest for failure to pay a tax.⁷ Nor is a tax, even after assessment, a judgment.⁸ "In a very broad sense," said Shaw, C. J., "a tax is a

¹² *Board v. Sinton*, *supra*.

¹⁴ Const. of 1895, Art. 10, § 7.

¹⁵ *Cf. Sun, etc., Co. v. Board*, 31 La. Ann. 175. See dissenting opinion in *Pugh v. Moore*, *supra*.

¹ *Camden v. Allen*, 26 N. J. L. 398.

² *Shaw v. Peckett*, 26 Vt. 482.

³ *Meriwether v. Garrett*, 102 U. S. 472.

⁴ *Home Savings Bank v. Boston*, 131 Mass. 277.

⁵ *In re Duryee*, 2 Fed. 68.

⁶ *Hinchman v. Morris*, 29 W. Va. 673.

⁷ *Appleton v. Hopkins*, 5 Gray (Mass.) 530.

⁸ *Marye v. Diggs*, 98 Va. 749. But see *State v. Georgia Co.*, 112 N. C. 34; *State v. M. & C. R. R. Co.*, 14 Lea (Tenn.) 56.

debt" because it is a fixed sum due by law, "but technically a tax is not a debt, and should not be so regarded for the purpose of enforcement and collection."⁹ Nevertheless there are some decisions to the effect that where the statute creating the tax provides no method of enforcement, the state or the tax collector may sue in *assumpsit* on non-payment.¹⁰ These cases do not, however, stand on the ground that where there is a right there is a remedy, and that as a tax is a debt *assumpsit* lies, but on the ground of a presumed legislative intent to grant the state a right of action for the enforcement of the tax,¹¹ and an opposite result has been reached when no such intention could be presumed.¹² They are therefore not to be considered as authority for allowing the action under all circumstances.¹³ A tax is an impost of the government, a charge upon certain property of its citizens,¹⁴ for the enforcement of which a special remedy is generally provided, and, aside from the technical difficulties of allowing an action at law in the nature of *assumpsit*, common law principles are against the subjection of taxpayers to the extra expense and harassment of suits at law growing out of burdens already sufficiently troublesome.¹⁵ And accordingly the weight of recent authority seems to be that *assumpsit* ordinarily does not lie.¹⁶

In a recent case the United States brought *indebitatus assumpsit* against a vendor of land, claiming a large sum under the Spanish War Tax, which provided for a fine in case of default. The court held that a tax was not a debt, that the statutory remedy was exclusive, and that the action could not be maintained. *United States v. Chamberlain*, 5 The Law 202 (C. C. A. Eighth Circ.). Although the sovereign is not bound by a statute unless expressly named, and is consequently not restricted to the remedy there given,¹⁷ and can enforce the tax in any proper method, it seems better, both on principle and authority, to confine the action of *assumpsit* to cases where the statute has provided for it expressly, or impliedly in certain cases by giving no remedy at all.

RECENT CASES.

AGENCY — EFFECT OF STATUTES ON RELATION — MASTER'S LIABILITY TO PROVIDE SAFE PLACE TO WORK. — A statute required the employment in every mine of a mining boss whose duty it was, as the miners advanced in their excavations, to see that all loose coal overhead was carefully secured against falling. The plaintiff, one of the defendant's miners, was injured by a fall of coal from the roof of the room in which he was working, owing to the negligent

⁹ *Appleton v. Hopkins*, *supra*, 533.

¹⁰ *Mayor v. Howard*, 6 Har. & J. (Md.) 383.

¹¹ As where the statute provides for the results of an action without expressly giving it. *State v. Snyder*, 139 Mo. 549. Or a previous statute gives it; the remedy then being in existence for one tax can be implied for the enforcement of another. *Dashiell v. Mayor*, 45 Md. 615. See also *Richardson v. Boston*, 148 Mass. 508, 510.

¹² *Louisville Water Co. v. Commonwealth*, 89 Ky. 244.

¹³ *Cf. McKeesport Borough v. Fidler*, 147 Pa. 532; 1 Cooley, Taxation, 1 ed., 13.

¹⁴ *Peirce v. Boston*, 3 Met. (Mass.) 520, 521.

¹⁵ See *State v. Piazza*, 66 Miss. 426, 430.

¹⁶ *McKeesport Borough v. Fidler*, *supra*; *Plymouth County v. Moore*, 114 Ia. 700. But see *State v. Georgia Co.*, *supra*; *City of Anniston v. Southern Ry.*, 112 Ala. 557.

¹⁷ *Savings Bank v. United States*, 19 Wall. (U. S.) 227.

performance by the mining boss of the duty imposed by the statute. *Held*, that the defendant is liable. *Antioch Coal Co. v. Rocky*, 82 N. E. 76 (Ind.).

For a discussion of the principles involved, see 20 HARV. L. REV. 230.

BANKRUPTCY — DISCHARGE — ASSIGNMENT OF WAGES AS LIEN ON FUTURE EARNINGS. — Wages to be earned in an existing employment were assigned as security for a debt. The assignor received his discharge in bankruptcy. The assignee endeavored to collect wages subsequently earned in the course of the original employment. *Held*, that the assignment operates to transfer to the assignee a potential possession of the future wages, which constitutes a lien and is accordingly preserved by § 67 d of the Bankruptcy Act. *Citizens' Loan Ass'n v. Boston & Maine R. R. Co.*, 82 N. E. 696 (Mass.). See NOTES, p. 275.

CHattel MORTGAGES — RIGHTS OF INTERVENING CREDITORS — PARTIAL SALE OF MORTGAGED STOCK BY MORTGAGOR. — A storekeeper gave a mortgage on his horses, wagons, and stock. The mortgage was duly recorded. Later he became insolvent and was adjudged a bankrupt. He had sold all but \$200 worth of the original stock. *Held*, that the mortgagee's lien attaches to the horses and wagons, but not to the remainder of the stock. *In re Davis*, 155 Fed. 671 (Dist. Ct., E. D. N. Y.).

A chattel mortgage giving the mortgagor a power of sale for his own benefit is void, being fraudulent towards creditors as a matter of law. See 19 HARV. L. REV. 557, 570. Among the conflicting decisions this seems to be the better and majority opinion. Under such a mortgage the mortgagee obtains no substantial security. He cannot, therefore, have entered into the transaction to secure himself, and consequently must have acted for the mortgagor. Therefore his intent must have been fraudulent, for to allow the mortgagor to have the full use of property which is forever safe from attachment defrauds his creditors. Evidence of a sale of the stock by the mortgagor for his own benefit justifies the inference of an agreement to that effect outside of the mortgage, rendering it void. *Simmons v. Jenkins*, 76 Ill. 479; *Hangen v. Hachmeister*, 114 N. Y. 566. But if fraudulent as to the stock, the mortgage is void *in toto*, and it would seem that the mortgagee had lost his lien on the horses and wagons also. *Russell v. Wynne*, 37 N. Y. 591.

CONFLICT OF LAWS — PERSONAL JURISDICTION — CONSENT AS BASIS. — The defendant, while residing in Australia, entered into a partnership with the plaintiff for working a gold mine there, but later moved to England. Afterwards the plaintiff brought suit in Australia to dissolve the partnership, and obtained a decree against the defendant for the latter's share of the deficiency which existed after settlement of the partnership accounts. The defendant did not appear in the Australian court, personally or by attorney. The plaintiff now brings action in England on the Australian judgment. *Held*, that since the Australian court was without jurisdiction, its judgment cannot be enforced in England. *Emanuel v. Symon*, 24 T. L. R. 85 (Eng., Ct. App., Nov. 15, 1907).

This decision reverses the decision of the lower court, criticized in 20 HARV. L. REV. 323.

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — RIGHT TO HEARING ON TAX ASSESSMENT. — The tax law of Georgia provided that on failure to return taxable property for taxation, though without fraud, taxes should be assessed and collected without a hearing on the question of the validity of the assessment. *Held*, that this system does not afford the due process of law required by the Fourteenth Amendment. *Central of Georgia Ry. v. Wright*, 207 U. S. 127.

This case is in accord with the tendency of recent decisions. For a discussion thereof, see 20 HARV. L. REV. 320.

CONSTITUTIONAL LAW — PRIVILEGES AND IMMUNITIES — RIGHT TO SUE IN COURTS OF A FOREIGN STATE. — A citizen of Pennsylvania was killed in that state while in the employ of the defendant company. His widow having acquired a right of action under a Pennsylvania statute, brought suit in Ohio.

An Ohio statute provides that when the death by wrongful act of an Ohio citizen in a foreign state creates a right of action there, that right may be enforced in Ohio. *Held*, that the Ohio statute, providing no remedy for the plaintiff, does not make an unconstitutional discrimination between the citizens of different states. *Chambers v. Baltimore & Ohio R. R.*, 207 U. S. 142.

At common law the Ohio courts did not entertain jurisdiction of actions for death by wrongful act arising under foreign laws. *Hover v. Pennsylvania Co.*, 25 Oh. St. 667. The present statute modifies the common law in allowing a remedy for a right so acquired in cases where the deceased was a citizen of Ohio. The citizenship of the person who acquires the right is immaterial. Access to the courts of Ohio will be denied the claimant under the foreign law whether he is a citizen of Ohio or a foreigner, if the deceased was a foreigner, and will be similarly granted if the deceased was an Ohio citizen. Consequently the decision of the court that this statute does not grant fundamental privileges to the citizens of one state which it denies to citizens of other states seems sound. The right of a state to open its courts to its own citizens, and to close them to citizens of other states has never been decided in the Supreme Court. It is interesting to note that the present case assumes, in accordance with previous dicta, that such a discrimination would be unconstitutional. But see 17 HARV. L. REV. 54.

CONSTRUCTIVE TRUSTS — MISCONDUCT BY NON-FIDUCIARIES — EFFECT OF CO-DEVISEE'S PROMISE TO TESTATOR UPON OTHER CO-DEVISEES. — By a drafted will R planned to leave his residuary estate to the defendants as tenants in common. Before signing, however, he desired to add a legacy to the plaintiff. Thereupon Y, one of the defendants, promised R that his wish should be executed, and R signed the will as drawn, the other defendants having no knowledge of Y's promise until after R's death. *Held*, that only the share of Y is bound by a trust for the plaintiff. *Powell v. Yearance*, 67 Atl. 892 (N. J., Ct. of Ch.).

Where a devise is secured by an oral promise to apply a part thereof for a third person, the law imposes upon the devisee a trust to fulfill his promise. See 20 HARV. L. REV. 403. Further, where the devise is in joint tenancy, a promise by one joint devisee, though unauthorized by his fellows, imposes a trust upon all. *Will of O'Hara*, 95 N. Y. 403. This is apparently due to the unity of interest among joint tenants. See 13 HARV. L. REV. 520. The English courts, though confessing the inconsistency, apply the doctrine to joint devisees only where the testator is induced to make a will, and not where he is induced to refrain from alteration. *In re Stead*, [1900] 1 Ch. 237. In the present case, there being neither agency nor joint tenancy, the promise of Y is not the promise of his co-devisees. Therefore, if a trust is imposed upon the other defendants, it must be in the absence of bad faith on their part. See 1 BIGELOW, FRAUD, 459. Since the whole doctrine is against the policy of the statute of frauds, it seems better to limit it to cases of clear bad faith. See *McCormick v. Grogan*, 4 Eng. & Ir. App. 82, 89. The cases of co-devisees are usually so excepted. *Edson v. Bartow*, 154 N. Y. 199; *Tee v. Ferris*, 2 Kay & J. 357; *contra*, *Hooker v. Axford*, 33 Mich. 453.

COPYRIGHTS — INFRINGEMENT — RIGHTS OF ASSIGNEE OF COMMON LAW COPYRIGHT. — An artist sold to the plaintiff the exclusive right to reproduce one of his paintings. The plaintiff then took out a statutory copyright, and published photographic copies of the original, each bearing upon its face the notice of copyright. The original was never so marked. The defendant also published copies of the original, claiming that the plaintiff had failed to observe the copyright law. *Held*, that when an article is copyrighted the original is not a copy and so need not bear on its face notice of the copyright. *American Tobacco Co. v. Werckmeister*, 207 U. S. 375.

For a discussion of the principles involved, see 19 HARV. L. REV. 380.

DAMAGES — MEASURE OF DAMAGES — BREACH OF WARRANTY AS TO CHARACTER OF SEEDS. — The defendant sold to the plaintiff a quantity of

seeds warranted to be alfalfa. The resulting crop contained some alfalfa, but consisted mostly of weeds, and was not marketable. *Held*, that the plaintiff may recover the value of the crop which would have resulted if all the seeds had been alfalfa. *Depew v. Peck Hardware Co.*, 121 N. Y. App. Div. 28.

The allowance of such prospective profits is usually based on the ground that the parties at the time of the warranty foresaw the use to which the seeds would be put, and that the value of the contemplated crop can be computed with reasonable certainty. *Passinger v. Thoburn*, 34 N. Y. 634. In the case of bulbs this certainty, at least as to quantity, is obvious, and the rule of the present case applies. *Edgar v. Breck*, 172 Mass. 581. But if no crop results from the wrong seeds, the evidence of the probable produce of the right seeds in the land and the year in question is insufficient, and hence the only damages recoverable are the expenses of planting and the rental value of the land. *Shaw v. Smith*, 45 Kan. 334; *contra*, *Phelps v. Eyria Milling Co.*, 12 Oh. Dec. 692. If there results a crop of the kind contemplated, but of inferior quality, prospective profits are allowed. *White v. Miller*, 71 N. Y. 118. If, however, the resulting crop is of an entirely different kind, it would seem that the computation of the expected crop is too uncertain. *Cf. Bell v. Mills*, 68 N. Y. App. Div. 531. The principal case seems to fall on this side of the line, though the fact that some of the expected kind of grass came up may be urged to support the decision.

ELECTIONS — CONSTITUTIONALITY OF VOTING MACHINES. — A state statute authorized the use of a voting machine whereby the voter made no separate ballot to be counted later, but had to trust to the mechanical accuracy of mechanism which he could not see. *Held*, that the machine does not fulfil the requirement of the state constitution that elections shall be by written vote. *Nichols v. Minton*, 82 N. E. 50 (Mass.).

For a discussion of a contrary holding under a slightly different constitutional provision, see 20 HARV. L. REV. 329.

ELECTIONS — INDORSEMENT OF BALLOTS WITH RUBBER STAMP. — A statute required that ballots should be indorsed with the initials of a judge of election. The ballots in question bore initials imprinted by a rubber stamp. *Held*, that the ballots are void. *Berryman v. Megginson*, 82 N. E. 256 (Ill.).

As the statute declared that ballots should not be counted unless indorsed by the initials of a judge, it was mandatory, not directory, and strict compliance was necessary. *Slaymaker v. Phillips*, 5 Wyo. 453. A stamp has been held sufficient where a signature is required. *Streff v. Coltaux*, 64 Ill. App. 179; *Bennett v. Brumfit*, L. R. 3 C. P. 28. But to effect the purpose of this statute, the greatest possible prevention of fraud, handwriting should be required. *Choisser v. York*, 211 Ill. 56. It shows that the ballot was cast in accordance with the law if the judge was honest; it is strong evidence against him if he was dishonest, whereas a stamp is not so strong evidence, since the die can be borrowed, stolen, or duplicated. It is often argued that such a statute as this is unconstitutional because a voter may be disenfranchised through the fault of judges of election. *Moyer v. Van de Vanter*, 12 Wash. 377. But the weight of authority is that, since a voter is presumed to know the law, if he uses a ballot without the initials of the election judge, his disenfranchisement is justifiable. *Miller v. Schallern*, 8 N. D. 395.

EMBEZZLEMENT — APPROPRIATION BY AGENT OF FUNDS COLLECTED ON COMMISSION. — An insurance company employed the defendant, who was not a general commission agent, to collect premiums, allowing him to deduct a commission from the funds received. He converted the whole to his own use. *Held*, that he is guilty of embezzlement. *Commonwealth v. Jacobs*, 104 S. W. 345 (Ky.).

If the agent is not to have his commission until he hands over to his principal the sum received, he is guilty of embezzlement if he feloniously converts it. *Commonwealth v. Smith*, 129 Mass. 104. But where he is entitled to deduct his commission before such delivery, he has an interest in the fund, and

it has been held, on the analogy of a similar appropriation by a partner, that he cannot be convicted. *McElroy v. People*, 202 Ill. 473. Other courts reach the opposite result by making the distinction that the partner receives for the firm of which he is a member, and hence for himself, whereas the agent receives for his principal. *People v. Civile*, 44 Hun (N. Y.) 497. But the agent is really a joint tenant of the sum. *State v. Kent*, 22 Minn. 41. And in general a joint tenant cannot steal or embezzle the *res*. See *State v. Kusnick*, 45 Oh. St. 535, 540. However, where it is composed of ordinarily separable articles, like a quantity of one-dollar bills, each person's share may be said to consist of a proportionate number of the articles rather than a proportionate interest in each article, and the difficulty of designating the exact objects in which the misappropriating party has no interest should not prevent conviction. 2 BISHOP, CRIM. L., §§ 370, 371.

EMINENT DOMAIN — COMPENSATION — EXPENSES FOR STATUTORY ALTERATIONS WHEN HIGHWAY OPENED ACROSS RAILWAY. — In an action to condemn a strip of land for a highway across the defendant's right of way, the defendant asked for compensation for the expense of making the alterations required by statute. *Held*, that the defendant is not entitled to such compensation. *City of Grafton v. St. Paul, M. & M. Ry. Co.*, 113 N. W. 598 (N. D.).

Several jurisdictions hold that a railroad should be compensated for the alterations made necessary by the opening of a highway crossing, though such alterations are required by police regulations. *Kansas Cent. R. R. Co. v. Board of County Commissioners*, 45 Kan. 716. There is an equal amount of authority, however, holding, in accord with the present case, that the railroad should not be compensated for alterations required by police regulations. *Chicago, Mil. & St. P. Ry. Co. v. City of Milwaukee*, 97 Wis. 418. These decisions seem unsound on principle, for the expense of the alterations is caused by the condemnation. When taking land by eminent domain imposes on the adjoining owners a statutory duty of erecting new fences, compensation for the fencing must be made. *Raleigh, etc., R. R. Co. v. Wicker*, 74 N. C. 220. But by holding arbitrarily that the railroad impliedly undertakes to make the changes necessitated by new highway crossings, the Supreme Court has denied the railroad compensation. *C., B. & Q. R. R. v. Chicago*, 166 U. S. 226. A statute in New York imposing this burden on railroads, and held constitutional as an exercise of the power of amending charters reserved to the legislature, effects the same result. *The Albany Northern R. R. Co. v. Brownell*, 24 N. Y. 345. Without such a provision it is submitted that the principal case should not be followed.

EQUITABLE CONVERSION — CONVERSION BY WILL PROVIDING FOR SALE AFTER TERMINATION OF PARTICULAR ESTATE. — A testator devised land to his wife for her life or widowhood, and directed that at her death or marriage it should be sold and the proceeds divided among their children. *Held*, that before the death or marriage of the widow, a son has an interest in the property attachable as realty. *Williams v. Lobban*, 104 S. W. 58 (Mo., Sup. Ct.).

When a testator by his will directs the sale of land at his death, and a distribution of the proceeds, the beneficiaries get no interest which can be attached as an interest in realty. *Brolasky v. Gally's Executors*, 51 Pa. St. 509. By the weight of authority, when the sale is not to be effected until a future time which is certain to arrive, such as a fixed date, or the termination of a life estate, the conversion takes place at the testator's death. *Handley v. Palmer*, 103 Fed. 39; *Lash v. Lash*, 209 Ill. 595. There are, however, a considerable number of cases which hold, in accord with the present decision, that the conversion occurs at the time appointed for the sale. *Savage v. Burnham*, 17 N. Y. 561. The majority view, however, seems correct. The conversion is due to the creation of a right to specific performance in equity; it should therefore take place when that right is created, and though it cannot be enforced until a later time, the right is created at the testator's death. See 18 HARV. L. REV. 266.

EVIDENCE — DECLARATIONS CONCERNING MATTERS OF PUBLIC OR GENERAL INTEREST — PROCEEDINGS OF A MEDICAL COUNCIL. — A medical council, acting within its statutory powers, ordered the removal of the plaintiff's name from the registered list of dentists on a report charging him with "conduct disgraceful in a professional respect." In a subsequent civil suit the defendant sought to prove the plaintiff's "professional misconduct." *Held*, that the order of the council is admissible. *Hill v. Clifford*, [1907] 2 Ch. 236.

The court regarded the order of the medical council as analogous to the finding of a lunacy inquisition. In so far as the order or findings of these related commissions, made under state authority, determine the status of an individual, they may be considered as judgments *in rem*. 2 SMITH, LEAD. CAS., 11 ed., 752. And on this ground the court found the evidence admissible. But a judgment *in rem*, although conclusive evidence of the relations which it establishes, is not evidence of the facts which must necessarily be found before it can be rendered. *Ward v. The Fashion*, 6 McLean (U. S.) 195. For these determinations of the court are *in personam* and only admissible between parties and privies. TAYLOR, EV., 9 ed., § 1673. As a judgment *in rem*, therefore, the admission of the order is proper only to show that the plaintiff was no longer a registered dentist, a fact not material to the issue raised. But the finding of a lunacy inquisition is always admissible against strangers as presumptive, not conclusive evidence of the fact of insanity, on the principle that the proceedings are matters of public and general interest. *Hughes v. Jones*, 116 N. Y. 67; 1 GREENLEAF, EV., 15 ed., § 556. And similarly, the report and order of this expressly authorized and publicly administered council are obviously trustworthy, and seem admissible.

GARNISHMENT — PROPERTY SUBJECT TO GARNISHMENT — GARNISHMENT OF OBLIGATION WITHOUT JURISDICTION OVER OBLIGEE. — A life insurance policy issued by a foreign corporation transacting business in New York in favor of non-resident beneficiaries was assigned to a New York creditor as security for advances. The insurance being due, the creditor garnished the insurance company in New York. The beneficiaries were served by publication. *Held*, that the garnishment is valid. *Morgan v. Mutual Benefit Life Ins. Co.*, 189 N. Y. 447.

For a discussion of the case in the lower court, see 21 HARV. L. REV. 219.

ILLEGAL CONTRACTS — CONTRACTS AGAINST PUBLIC POLICY — AGREEMENT EXEMPTING RAILROAD FROM STATUTORY LIABILITY FOR LOSS BY FIRE. — A South Carolina statute provided that a railroad should be liable for any damage to goods on its premises caused by fire, unless the goods were placed there without its consent. The plaintiff put cotton on the defendant railroad's platform under a contract which stipulated that the cotton was put there without the consent of the railroad and at the owner's risk. *Held*, that the plaintiff cannot recover for the destruction of the cotton by fire. *German-American Ins. Co. v. Southern Ry. Co.*, 58 S. E. 337 (S. C.).

It seems clear that the railroad consented to the placing of the cotton on its premises, but attempted to exempt itself by contract from its statutory liability. It is sometimes argued that the object of statutes like the one in question is to make railroads more careful in the construction and operation of their engines. See *Rodemacher v. Mil. & St. P. Ry. Co.*, 41 Ia. 297, 309. But the true reason for such statutes seems to be based on the equitable principle that, as between two innocent parties, the loss should fall on the one who, by the use of a dangerous agency, makes such loss possible. *McCandless v. Richmond, etc., R. R. Co.*, 38 S. C. 103; see *St. Louis, etc., Ry. Co. v. Mathews*, 165 U. S. 1. It is settled law that a contract exempting a railroad from its common law liability for loss by fire is not against public policy. *Hoadley v. Northern Transportation Co.*, 115 Mass. 304. Consequently, there would seem to be no reason in public policy why an innocent party may not exempt himself by contract from an exactly similar liability imposed by statute. In accordance with this view, under similar statutes in Iowa and Missouri, such contracts have been

held not to be against public policy. *Griswold v. Ill. Cent. Ry. Co.*, 90 Ia. 265; *American Cent. Ins. Co. v. Chicago & Alton Ry. Co.*, 74 Mo. App. 89.

ILLEGAL CONTRACTS — CONTRACTS AGAINST PUBLIC POLICY — CONTRACT BASED ON BREACH OF EXISTING CONTRACT. — The plaintiff was under contract for one year with F, a competitor of the defendant. The defendant made a secret agreement with the plaintiff to employ him for two years. This involved a breach of the contract with F, and was done to destroy F's business. *Held*, that the plaintiff cannot recover his salary, or for materials furnished. *Rhoades v. Malta Vita Pure Food Co.*, 112 N. W. 940 (Mich.).

It is often averred that contracts involving the commission of a civil injury to a third person are illegal. 15 AM. & ENG. ENCYC., 2 ed., 943; 9 CYC. 468. Under this broad language an agreement by A to buy goods of B would be unenforceable by B if the sale involved a breach of B's contract to deliver the same goods to C. Parties guilty of unlawful acts are not to be outlawed to that extent. *Cf. Nat'l, etc., Co. v. Cream City Co.*, 86 Wis. 352. Such cases fall rather within the class where the illegality is separate from the contract, which is therefore valid. *Armstrong v. Toler*, 11 Wheat. (U. S.) 258. Accordingly, the rule should be limited to cases where the injury involved forms the actual consideration for the promise to be enforced. In the present case the consideration — services rendered — was lawful, and the fact that the motive inducing the defendant's promise was the violation of the plaintiff's obligation to F should not make it illegal. However, though improperly included within the general rule, the decision may be supported on the ground that the plaintiff participated in an illegal conspiracy and that it is against public policy to enforce contracts between conspirators. *Cf. Veasey v. Allen*, 173 N. Y. 359.

INSOLVENCY — RIGHTS OF SECURED CREDITORS AGAINST INSOLVENT ESTATE. — Upon the death of his debtor a secured creditor filed his claim with the administrator for the full amount of his debt. The estate proved to be insolvent. The secured creditor foreclosed on his security before any debts of the decedent had been paid, and contended that he was entitled to a dividend on his claim as originally filed. *Held*, that the creditor can only receive a dividend on the amount due at the time of payment. *In the Matter of the Estate of Lavinia Kapu, Deceased*, Sup. Ct. of Hawaii, Sept. 10, 1907. See NOTES, p. 280.

INSURANCE — MUTUAL BENEFIT INSURANCE — INVALID CHANGE OF BENEFICIARY. — A member of a mutual benefit association surrendered the original beneficiary certificate and procured the issue of another, naming a new beneficiary who was by statute incapable of taking. After the member's death the beneficiary of the original certificate sued the association for the proceeds. *Held*, that the proceeds will be distributed as though no beneficiary had been named. *Grand Lodge, etc. v. Mackey*, 104 S. W. 907 (Tex., Civ. App.). See NOTES, p. 278.

INTERSTATE COMMERCE — CONTROL BY CONGRESS — FEDERAL EMPLOYERS' LIABILITY ACT. — The Act of Congress of June 11, 1906, c. 3073, 34 Stat. at L. 232, 233, provided that "every common carrier engaged in trade or commerce . . . between the several states . . . shall be liable to any of its employees or in case of death to his personal representative . . . for all damages which may result from the negligence of any of its officers, agents, or employees. . . ." *Held*, that the statute is unconstitutional. *Howard v. Illinois Central R. R.*, U. S. Sup. Ct., Jan. 6, 1908.

The five justices forming the majority agreed only on the ground that the terms of the statute were so broad as to include intra-state commerce, that as to this the statute was unconstitutional, and that this portion could not be separated from the rest. The dissenting justices were unanimous in rejecting this interpretation. Two members of the majority joined the four in the minority in declaring that Congress had the power to prescribe such a rule of liability. if

its operation were confined solely to those engaged in interstate commerce. The remaining three members of the majority declined to commit themselves on this subject. For a discussion of the principles involved in this last point, see 20 HARV. L. REV. 481.

LANDLORD AND TENANT — COVENANTS IN LEASES — WHETHER COVENANT INDIRECTLY AFFECTING VALUE RUNS WITH LAND. — A lease from A to B contained a proviso for reentry in case of breach of B's covenant to repair. In making a sublease of part of the premises to C, B covenanted that he would repair the part of the premises retained. The defendant, B's assignee, failed to repair; whereupon A reentered and ejected the plaintiff, C's assignee. *Held*, that B's covenant to C did not run with the land sublet so as to give C's assignee a right of action. *Dewar v. Goodman*, 24 T. L. R. 62 (Eng., Ct. App., Nov. 8, 1907).

This decision affirms that of the lower court, for a discussion of which see 20 HARV. L. REV. 577.

LANDLORD AND TENANT — RENT — DISTRESS ON STRANGER'S GOODS ON PREMISES. — The plaintiff was an underlessee of rooms on the defendant's premises, in which he conducted an art club where exhibitions were held for the sale of members' paintings, the plaintiff retaining a commission. These exhibitions were open only to persons invited or introduced by members. A distress was levied on the premises by the defendants for rent due from the immediate lessee, and certain of the pictures in the art club were seized. *Held*, that the pictures are subject to the distress. *Challoner v. Robinson*, 42 L. J. 527 (Eng., Ch. D., July 30, 1907). Appeal dismissed, [1908] 1 Ch. 49.

As a general rule at common law, since the landlord is supposed to give credit to a visible stock on the premises, whatever chattels are found there, whether they belong to the tenant or not, may be distrained on. *Gorton v. Faulkner*, 4 T. R. 565; *Lyons v. Elliott*, 1 Q. B. D. 210. But there is an exception in favor of trade. *Connah v. Hale*, 23 Wend. (N. Y.) 461; *Simpson v. Hartopp*, Willes, 512. The principle seems to be that, where the tenant in the course of a public trade is necessarily put in possession of the goods of others, such goods, although on the demised premises, are not liable to distress for rent. However, the trade must be public; that is, a trade which is in general open to the public, though not necessarily one which is classified as a public calling. See *Muspratt v. Gregory*, 1 M. & W. 633, 652; 3 *ibid* 677. Clearly, then, the present decision is sound. The plaintiff's trade was not a public trade in any sense. And the privilege, when granted, is not primarily for the trader; the law, in consideration of the benefit which the community derives from the carrying on of the trade, protects the goods. See *Muspratt v. Gregory*, *supra*, 645, 646.

LEGACIES AND DEVISES — LAPSED BEQUESTS AND DEVISES — SET-OFF OF DEBT OF ORIGINAL LEGATEE AGAINST LEGATEE SUBSTITUTED BY STATUTE. — A statute provided that if a legatee died before his testator the legacy should not lapse, but should go to the legatee's heir "in the same way it would have gone to the legatee had he survived." *Held*, that the legacy falling to the heir of a deceased legatee is subject to debts owed the testator by the deceased legatee. *Tilton v. Tilton*, 82 N. E. 704 (Mass.).

An executor may set off debts owed the testator against a legatee, since the debts are assets, the retention of which by the legatee would be inequitable. *Howland v. Hecksher*, 3 Sandf. Ch. (N. Y.) 519, 525. A similar set-off may be made against the legatee's assignee, since the latter stands in the shoes of his assignor. *Estate of Casper Dull*, 137 Pa. St. 116. But in the present case the primary legatee never had any interest whatever in the estate. *Matter of Hafner*, 45 N. Y. App. Div. 549. On his predeceasing the testator, his heir takes under the testator's will, to the exclusion of the legatee's husband, wife, or personal representatives. *Jones v. Jones*, 37 Ala. 646. If the testator in his lifetime had erased the name of one legatee and substituted another, it is clear that the legacy would not be subject to the debts of the first legatee. The statute operates in a similar way, substituting a new legatee for one who cannot

take, in order to prevent a lapsed legacy. The weight of authority in similar devise cases is that the substituted heir takes free. *Powers v. Morrison*, 88 Tex. 133. The statute should have the same effect in the case of a legacy. *Carson v. Carson's Executor*, 1 Met. (Ky.) 300.

MUNICIPAL CORPORATIONS — ACTIONS BY MUNICIPAL CORPORATIONS — ESTOPPEL BY LACHES.— The plaintiff company maintained uninterrupted and exclusive use of streets in an unused portion of the city for over forty years, and had invested large sums which would be lost if the street should be reopened. *Held*, that the city is equitably estopped from claiming that the plaintiff's structures constituted an obstruction of the street. *City of Chicago v. Illinois Steel Co.*, 82 N. E. 286 (Ill.).

No estoppel arises when both parties are equally well informed. *Attkisson v. Plum*, 50 W. Va. 104. In the principal case, therefore, what is actually laches and adverse possession is treated as an estoppel because of the fancied injustice in ousting one who has knowingly occupied and improved municipal property. The better doctrine is that one who encroaches on the public domain without affirmative justification does so at his peril. *Barter v. Commonwealth*, 3 Pa. 253; *Lawrenceburg v. Wesler*, 10 Ind. App. 153. But decisions similar to the present case are frequent. *N. Y., N. H. & H. R. R. v. New Haven*, 46 Conn. 257. Such cases seem but a logical conclusion from the doctrine that municipal corporations are not exempt, as is the state, from the operation of the statute of limitations and its equitable counterpart, laches. *Boone County v. Burl., etc., R. R.*, 139 U. S. 684. But this discrimination against the rights of smaller sections of the public seems unjustifiable. *Cf.* 20 HARV. L. REV. 644. The courts, however, should no more support a municipality in unconscionable proceedings than an individual; so, where justice requires it, a public right may be lost by estoppel. But in the present case the city made no representations on which the plaintiff could rely, and hence the basis of true estoppel is lacking.

MUNICIPAL CORPORATIONS — ASSESSMENTS FOR LOCAL IMPROVEMENTS — ASSESSMENT OF RAILROAD RIGHT OF WAY.— Under statutory provision a city council ordered a sidewalk to be constructed, and assessed the abutting property owners, including a railroad corporation holding an abutting right of way. The corporation objected that its property was not benefited by the improvement. *Held*, that the assessment by the city council is conclusive as to what property is benefited. *Northern Pac. R. R. Co. v. City of Seattle*, 91 Pac. 244 (Wash.).

Whether or not a railroad right of way is subject to special assessment is a disputed question. See 2 ELLIOTT, RAILROADS, § 786. The power to assess is usually granted by statutes which authorize the municipality to declare what property is benefited by an improvement and to assess accordingly. The basis of this taxation is benefit to the particular property assessed, aside from the general benefit to the community. It is obviously difficult to find sufficient benefit to a railroad right of way by most improvements of adjoining streets to justify a special assessment. But such improvements as the establishment of contiguous drainage are clearly of benefit to a right of way. *Louisville, etc., R. R. Co. v. State*, 122 Ind. 443. And an assessment has been held constitutional where there was only a possibility of future benefit to the right of way. *Louisville & Nashville R. R. Co. v. Barber Asphalt Paving Co.*, 197 U. S. 430. The courts will properly go to great lengths in supporting a legislative finding of benefit. But to preclude the courts from any review of the legislative determination would open the door to arbitrary and unreasonable confiscation of property by a municipality, and on this ground the decision in the present case cannot be supported. See *Allegheny City v. West Pa. R. Co.*, 138 Pa. St. 375; 2 DILL., MUN. CORP., § 761.

PARTNERSHIP — RIGHTS AND REMEDIES OF CREDITORS — OSTENSIBLE PARTNERSHIP.— A carried on business under the firm name of A & B. B was an infant. A separate creditor of A attached assets of the ostensible firm,

which were then claimed by a firm creditor. *Held*, that the firm creditor is entitled to priority over the separate creditor as to these assets. *Codville Georgeson Co. v. Smart*, 10 Ont. W. Rep. 466.

In the distribution of firm assets a firm creditor is entitled to priority over an individual creditor of one member of the firm, though the other member is an infant. *Lovell v. Beauchamp*, [1894] A. C. 607; see 8 HARV. L. REV. 361. The rule of priority has been held to apply in the case of the bankruptcy of an ostensible firm. *Ex parte Hayman*, 8 Ch. D. 11; *Kelly v. Scott*, 49 N. Y. 595. The English case distinctly puts this on the statutory ground of reputed ownership, which could not apply to the principal case where there is no bankruptcy. The preference of firm creditors is said to result from the equitable lien which each partner has on the firm assets. *Case v. Beauregard*, 99 U. S. 119. But in the case of an ostensible partnership there can be no such lien in fact; and no good reason appears why the separate creditors should be estopped from denying its existence. See 10 HARV. L. REV. 49. There are accordingly some cases which hold that a prior attaching creditor, whether he gave credit to the ostensible firm or to the actual member personally, gets a preference over a subsequently attaching creditor. *Himmelreich v. Shaffer*, 182 Pa. St. 201.

PATENTS — INFRINGEMENT — COMPENSATORY DAMAGES IN EQUITY. — On January 27, 1902, the defendants, after several years of unlicensed use, abandoned two machines which infringed the complainant's patent. On November 1, 1901, the complainant established with third persons a general uniform license rate, payable quarterly, the first instalment due December 10, 1901. No evidence was offered of any profits accruing to the defendants from the infringement. *Held*, that the complainant may recover the amount of one quarter's license for two machines, with interest from January 27, 1902. *Diamond Stone Sawing Mach. Co. v. Brown*, 155 Fed. 753 (Circ. Ct., E. D. N. Y.).

The federal courts, in exercising equity jurisdiction over patent infringements, formerly measured the recovery solely by the defendant's profits. See *Root v. Railway Co.*, 105 U. S. 189, 194. However, U. S. Rev. Stat., § 4921, enlarges the equity remedy, by entitling the complainant to recover the damages he has sustained "in addition to the profits to be accounted for by the defendant." Under this provision, compensatory damages fixed by license fees were awarded a complainant, it appearing that the infringer obtained no profits. *Marsh v. Seymour*, 97 U. S. 348. The present decision goes one step further, awarding compensatory damages without regard to the defendant's profits. The license fee is the accepted measure of the complainant's loss, but only where such fee is general and uniform, and established prior to the infringement. See *Rude v. Westcott*, 130 U. S. 152, 165. Since the license fee here was not established until November 1, 1901, and was the only evidence of the complainant's loss, the court rightly refused damages for infringements perpetrated before that date. Where license fees are the measure of damages, the courts have awarded interest from the time such fees fell due. *Locomotive Safety Truck Co. v. Penn R. R. Co.*, 2 Fed. 677; *McNeely v. Williams*, 96 Fed. 978. The present decision is a departure from these cases.

PROXIMATE CAUSE — INTERVENING CAUSES — OWNER INJURED IN SAVING PROPERTY ENDANGERED BY DEFENDANT'S NEGLIGENCE. — A spark from the defendant's engine ignited combustible materials allowed by the defendant to collect along its track. The plaintiff's intestate, seeing her buildings in danger, tried to extinguish the fire and, though using due care, was burned to death. *Held*, that the plaintiff can recover, since the defendant's negligence was the proximate cause of the death. *Illinois Central R. R. Co. v. Siler*, 82 N. E. 362 (Ill.).

For a discussion of the principles involved, see 16 HARV. L. REV. 379.

RECEIVERS — APPOINTMENT BY STATE COURT AFTER APPOINTMENT BY FEDERAL COURT. — New Jersey creditors of a New York corporation secured

the appointment of receivers for its property by the federal circuit court. Then the attorney-general of New York, in the course of a suit to dissolve the corporation pursuant to statute, because of its insolvency for a year, moved for the appointment of receivers for its property. A statute permits the appointment in a dissolution suit. *Held*, that receivers will be appointed, but they are to request the federal court to relinquish control, and are not to molest the federal receivers. *People v. N. Y. City Ry.*, 107 N. Y. Supp. 247 (Sup. Ct.). See NOTES, p. 279.

SALES — IMPLIED WARRANTIES — OBLIGATIONS OF VENDOR OF STOCK. — The appellant purchased from the appellee shares in a certain mining corporation. The corporation proved to be a *de facto* one, and the shares part of an illegal over-issue. The appellant sought to rescind the sale. *Held*, that the sale is valid, since the vendor of stock impliedly warrants only his title to the stock and its genuineness. *Burwash v. Ballou*, 82 N. E. 355 (Ill.).

The vendor of stock impliedly warrants his ownership in the stock certificate, that it is genuine, and that he is authorized to transfer the title thereto. If the vendee desires further protection, he must ordinarily exact an express warranty. *Higgins v. Ill. Trust and Savings Bank*, 193 Ill. 394. Since the vendor and vendee are presumably on an equal footing, there seems to be no element of unfairness which demands the implication of further warranty that the stock sold is stock of a *de jure* corporation. *Harter v. Eltsroth*, 111 Ind. 159. Where there is a contract for the sale of bonds of which there is only an unauthorized issue outstanding, delivery of bonds of such issue is sufficient. *Otis v. Cullum*, 92 U. S. 447. Where, however, there are both authorized and unauthorized issues, delivery of bonds of the illegal issue, though in good faith, is not a sufficient compliance with the terms of the contract, since it is presumed that the vendee contracted for bonds of the valid issue. *Meyer v. Richards*, 163 U. S. 385. The same rule would seem to apply to issues of stock, though the present case fails to notice the distinction. *Cf. Lincoln v. Express Co.*, 45 La. Ann. 729; *contra, People's Bank v. Kurts*, 99 Pa. St. 344.

STATES — VALIDITY OF STATE BOND STOLEN AFTER REDEMPTION BEFORE MATURITY. — A statute authorized an issue of negotiable state bonds, redeemable before maturity, and provided that all bonds redeemed should be destroyed. A bond which had been redeemed, but not cancelled or destroyed, was stolen and came into the possession of the relator, a holder in due course. *Held*, that *mandamus* lies to compel the state treasurer to redeem the bond again. *Ehrlich v. Jennings*, 58 S. E. 922 (S. C.). See NOTES, p. 282.

STATUTES — INTERPRETATION — REQUIREMENT OF KNOWLEDGE IN CONVICTIONS UNDER THE SAFETY APPLIANCE ACT. — Section 2 of the Safety Appliance Act, 27 Stat. at L. 531, makes it unlawful for any common carrier "to haul, permit to be hauled or used on its line any car used in moving interstate traffic" not equipped with workable automatic couplers. In an action thereunder, the government proved defects in the couplers without proving the defendant's knowledge thereof. *Held*, that to sustain a conviction, the evidence must prove beyond a reasonable doubt that the carrier either had discovered the defects, or could have discovered them by the exercise of the utmost care. *United States v. Illinois Cent. R. R. Co.*, 156 Fed. 182 (Dist. Ct., W. D. Ky.); *contra, United States v. C., B. & Q. Ry. Co.*, 156 Fed. 180 (Dist. Ct., D. Neb.).

So far as it is necessary to prevent injury to persons or property, the regulation and control of railroads is within the police power of the states. *Jones v. Alabama & Vicksburg Ry. Co.*, 72 Miss. 22. The purpose of the Safety Appliance Act, as set forth in the title, is to promote the safety of employees and travellers. It is analogous to an exercise of state police power. No *mens rea* is required to convict for offenses against police regulations involving no moral turpitude. *Com. v. Wentworth*, 118 Mass. 441. The present case can therefore be supported only by reading into the act a requirement of knowledge. It is settled that though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. See

Johnson v. Southern Pacific Co., 196 U. S. 1, 17. On the other hand, the operation of a statute has been restricted within narrower limits than its words imported when the court considered that the literal meaning would extend to cases which the legislature never intended to include. *United States v. Kirby*, 7 Wall. (U. S.) 482. This rule, at best dangerous, is inapplicable here, as Congress may have desired to procure a high degree of care by imposing absolute responsibility. And the weight of authority is against the present case. *United States v. Southern Ry. Co.*, 135 Fed. 122.

TAXATION — COLLECTION AND ENFORCEMENT — ACTION AT LAW. — The United States brought *indebitatus assumpsit* to collect a sum due under the Spanish War Tax, which provided for a fine in case of non-payment. *Held*, that the action does not lie. *United States v. Chamberlain*, 5 The Law 2.2 (C. C. A., Eighth Circ., Oct. 17, 1907). See NOTES, p. 283.

TAXATION — GENERAL LIMITATIONS ON TAXING POWER — UNEQUAL TAXATION OF BANK SHARES AND OTHER MONEYED CAPITAL. — A New York statute imposed a tax of one per cent on the value of the stock of all banks organized under the laws of the state or of the United States, without any deduction for the personal indebtedness of the owners. In the case of taxes on all other personalty such deduction was allowed, but the tax rate was more than twice as high. *Held*, that there is no discrimination against national bank shares. *People ex rel. Bridgeport Savings Bank v. Feitner*, 120 N. Y. App. Div. 838.

The federal statutes provide that a state tax on national bank stock must not be at a greater rate than that upon other "moneyed capital." U. S. REV. STAT. § 5219. This is to prevent discrimination tending to discourage investments in national bank shares. *First Nat'l Bank v. City of Richmond*, 39 Fed. 309. But moneyed capital only includes money employed where the object of the business is the making of profit by its use as money. *Mercantile Bank v. New York*, 121 U. S. 138. Consequently, if the tax is void it is solely because the rate is higher on the stock of a banking corporation than on other moneyed capital, and this is a question of fact. In considering it the whole tax system must be considered rather than an exceptional effect in a peculiar case. *Pelton v. Nat'l Bank*, 101 U. S. 143. A difference in name or method of assessment is not a discrimination unless there is in fact a greater burden on national banks. *Nat'l Bank of Wellington v. Chapman*, 173 U. S. 205; *Van Slyke v. State*, 23 Wis. 655. The conclusion of the court seems justified in view of the fact that the small portion of moneyed capital not in bank stock and from which a deduction for debt is allowed pays a much higher rate than bank shares.

TAXATION — PARTICULAR FORMS OF TAXATION — STATE INHERITANCE TAX ON STOCK OF CORPORATIONS INCORPORATED IN SEVERAL STATES. — A New Hampshire testatrix bequeathed stock in a corporation incorporated in Massachusetts and in other states. *Held*, that the value of this stock for the purpose of the succession tax to be paid in Massachusetts is limited to the value of the franchise and property in Massachusetts which it specifically represents. *Kingsbury v. Chapin*, 82 N. E. 700 (Mass.).

This decision follows a recent New York decision commented on in 20 HARV. L. REV. 313.

TAXATION — PURPOSES FOR WHICH TAXES MAY BE LEVIED — STATE AID TO DISABLED FIREMEN. — A South Carolina statute provided that fire insurance companies doing business within the state should pay a percentage on local premiums to the state treasurer for the benefit of disabled members of fire departments. *Held*, that the statute is unconstitutional. *Aetna Fire Ins. Co. v. Jones*, 59 S. E. 148 (S. C.). See NOTES, p. 277.

TRESPASS TO REALTY — WHAT CONSTITUTES A TRESPASS — FORCIBLE EVICTION OF TRESPASSER BY OWNER. — A and B were adjoining landowners. Through an innocent mistake, A built a house partly on his own and partly on B's land. Five years thereafter B forcibly entered upon A, sawed the house in

two, and carried away the portion that stood on his land. A sued B in trespass *quare clausum fregit*. Held, that A can recover punitive as well as actual damages. *Bollinger v. McMinn*, 104 S. W. 1079 (Tex., Civ. App.).

Formerly an owner might assert his right to immediate possession by necessary force and plead his title in justification to an indictment for breach of the peace. 1 HAWKINS, P. C., 8 ed., 495. When deprived of this defense by later statutes, he still could not be sued in trespass *quare clausum fregit*. *Taylor v. Cole*, 3 T. R. 292; see *Harvey v. Bridges*, 14 M. & W. 437, 442. But it has been held that a tenant forcibly ejected may bring trespass against his landlord, because such act is criminal. *Thiel v. Bull's Ferry Land Co.*, 58 N. J. L. 212. The great weight of authority, however, is against such a result. *Low v. Elwell*, 121 Mass. 309; *contra*, *Dustan v. Cowdrey*, 23 Vt. 631. The minority view is based, not on sound principle, but on public policy, to preserve peace and to secure a resort to legal measures instead of physical force. The same public policy is invoked by the Texas court in the present case as the basis for allowing a mere trespasser to maintain trespass against an owner entitled to immediate possession. Such an unwarranted step beyond the view of the minority courts is *a fortiori* opposed to the great weight of decided cases.

BOOKS AND PERIODICALS.

I. LEADING LEGAL ARTICLES.

MATRIMONIAL DOMICILE AS A BASIS FOR DIVORCE. — Marriage is a status.¹ For many purposes a status may be regarded as an incorporeal *res* created by law. Of course, such a *res* can have no real situs, but since the state of the domicile has an especial interest therein,² a status is treated as if it had a situs there. Hence the law of the domicile alone may alter or terminate it.³ This is peculiarly true of marriage. Therefore, in actions for divorce, which closely resemble actions *in rem*, domicile is an essential jurisdictional fact.⁴

Logically every marriage contains three domiciliary possibilities, (a) the individual domicile of the husband, (b) the individual domicile of the wife, (c) the matrimonial domicile — the place where the spouses reside as man and wife, *animo manendi*. In England the domicile of a married woman is, during coverture, merged in that of her husband.⁵ She cannot obtain a separate domicile even for purposes of divorce.⁶ It is also held that the husband's domicile is the single jurisdictional fact.⁷ Accordingly in England the matrimonial domicile, in so far as it fails to conform to, or represents more than the domicile of the husband, is without effect upon jurisdiction. In America, however, the great weight of authority makes an exception to the general rule, and permits a

¹ *Bell v. Bell*, 181 U. S. 175; *Le Mesurier v. Le Mesurier*, [1895] A. C. 517; *State v. Armington*, 25 Minn. 29.

² *Wilson v. Wilson*, L. R. 2 P. & D. 435, 442 (marriage); *In re Goodman's Trusts*, 17 Ch. D. 266, 297 (legitimacy).

³ *Scott v. Sandford*, 19 How. (U. S.) 393 (slavery); *Eddie v. Eddie*, 8 N. D. 376 (legitimacy); *Maynard v. Hill*, 125 U. S. 190 (marriage).

⁴ Domicile should be the single jurisdictional fact. See 19 HARV. L. REV. 586. This is the case in England. *Le Mesurier v. Le Mesurier*, *supra*. But in this country *Haddock v. Haddock*, 201 U. S. 562, has superadded personal jurisdiction of the libellee in certain cases.

⁵ Dicey, Conf. of Laws, 127.

⁶ *Dolphin v. Robins*, 7 H. L. Cas. 389. But see *infra*, note 7.

⁷ *Warrender v. Warrender*, 2 Cl. & F. 488. But see *Armitage v. Atty.-Gen.*, [1906] P. 135; *Armtyage v. Armytage*, [1898] P. 178.

wife to obtain a separate domicile, though for purposes of divorce only.⁸ Either domicile on the part of the husband,⁹ or on the part of the wife,⁸ confers jurisdiction on the court. And prior to *Haddock v. Haddock*,¹⁰ a divorce obtained at either domicile was entitled to full faith and credit throughout the Union,⁹ without reference either to matrimonial domicile or to personal jurisdiction of the libellee. Before that decision, therefore, matrimonial domicile, as distinguished from the individual domicile of either husband or wife, was without jurisdictional significance, precisely as it is without such significance in England today.

It is true, as a recent article points out, that certain Scotch cases had suggested that matrimonial domicile, as distinguished from the individual domiciles of the spouses at the time of proceedings, might be a basis of jurisdiction, but *Le Mesurier v. Le Mesurier*¹ swept this doctrine away. *Matrimonial Domicile*, Anon., 11 Bench and Bar 37 (November, 1907). It remained for *Haddock v. Haddock*¹⁰ to revive this discarded view in America. That case apparently holds that, unless the divorce proceedings be brought at the matrimonial domicile, personal jurisdiction of the libellee must be superadded to individual domicile on the part of the libellant to entitle the decree to full faith and credit throughout the Union. Thus, matrimonial domicile may, in certain cases, replace individual domicile as the jurisdictional fact.

But matrimonial domicile is a most unsatisfactory basis for divorce jurisdiction. It is of necessity a domicile of choice. To create it there must be conjugal residence within the state, *animo manendi*. It may therefore never exist at all. If, then, matrimonial domicile is made the sole jurisdictional fact, there can be no divorce at all in such a case, since cohabitation after the offense, with knowledge of it, works condonation. This is a hardship on the parties, and also denies to the states in which they may have individual domiciles proper control over the marriage status. And this remains true, though the spouses have separate domiciles in the same state, since two individual domiciles added together do not make a matrimonial domicile. Nor is the situation greatly improved if the spouses obtain a matrimonial domicile, but separate prior to the offense and acquire individual domiciles elsewhere. Here a divorce may be possible if we allow matrimonial domicile, like individual domicile, to persist after abandonment until a new matrimonial domicile is established, but the injured party, *ex hypothesi*, must resort to the matrimonial domicile, to the exclusion of the state of individual domicile. In other words, neither of the states really interested by reason of domicile may grant the divorce, while the state which has ceased to be interested may do so. Such a divorce proceeding is little better than an *ex parte* action *in personam*. Yet it has been held again and again that personal jurisdiction of both parties is insufficient to sustain a divorce.¹ Under one set of circumstances, it is true, the matrimonial requirement has no ill effects. If either spouse happens to have an individual domicile in the state of matrimonial domicile, almost all American courts agree that divorce is proper, but there it is the individual domicile which saves the situation. If both kinds of domicile coincide, it is immaterial, in that particular case, which one is chosen as the jurisdictional fact. The total result is, therefore, that unless the matrimonial requirement is without effect, it prevents divorce in those states where divorce should be granted, while perhaps making it possible in that state where divorce should be denied. And surely, from a practical point of view, there is a fine Rabelaisian irony in requiring the spouses to cohabit in some state, *animo manendi*, as a condition precedent to dissolving the marital relation.

E. H. A., JR.

COMMISSION ON A SALE SUBSEQUENT TO A LETTING PROCURED BY AN AGENT. — A recent decision of the English Court of Appeal that an estate agent with whom a landowner had placed property and who had procured a

⁸ *Ditson v. Ditson*, 4 R. I. 87; *Cheever v. Wilson*, 9 Wall. (U. S.) 108.

⁹ *Atherton v. Atherton*, 181 U. S. 155.

¹⁰ 201 U. S. 562.

tenant and received his commission for the letting, should, on a subsequent sale of the property directly between the landowner and the tenant, be entitled to a commission,¹ is discussed by Mr. J. K. F. Cleave in a recent article. *Letting and Subsequent Sale: Estate Agents' Commissions*, 33 L. Mag. and Rev. 48 (November, 1907). After an examination of the authorities the author concludes that this decision has thrown the law on an apparently simple branch of agency into an unsettled state.

In such cases the result is to be reached through the answers to two questions: (1) Was the plaintiff employed by the defendant to bring about the transaction with respect to which he claims a commission or does a former agency still exist and cover that transaction? (2) Did the plaintiff bring about that transaction, or, as it is frequently put in the books, was he the "procuring" or "efficient" cause? On the agent's ability to establish the affirmative of both these questions depends his right to a commission.² The discussion, then, must be solely as to an issue of fact, and when it is said that there is a confusion in the cases it is well to bear in mind a point which the author apparently overlooks, that these findings of fact cannot, in the nature of things, be absolutely binding and conclusive on subsequent issues. However, the criticism of the case in question is not without foundation, since certain questions of fact recur again and again, and it is desirable that some uniformity in the findings should be preserved. Indeed, to render the dealings of landowners and estate agents more certain, it might be well that certain findings should become crystallized into rules of law.

The answer to the first question, whether the employment still exists, should depend on certain principles and, to some extent, it does. Thus, where the agent has effected a sale, the landowner cannot defeat his right to commission by a fraudulent discharge,³ or by refusing to comply with the sale procured.⁴ But where no time limit is fixed the employment ceases if after a reasonable time the agent has failed to find a customer.⁵ And if, as in the present case, an agent has been employed to let or sell and procures a tenant, the better view, in absence of anything to the contrary in the agreement, seems to be that he has exhausted his power and that he is not entitled to commission on a subsequent sale by the landowner to the tenant.⁶ Any other rule would unreasonably deprive the owner of a free right to the world as a market. The recent decision which Mr. Cleave criticizes seems to have resulted from a disregard of this principle. In answer to the second question, it is impossible to determine or formulate anything definite as to what constitutes "efficient" cause. At least, something more than a mere introduction to the landowner of the person who ultimately becomes the purchaser is required.⁷

Mr. Cleave also discusses another point: whether the question is to be left to the jury or reserved for the court. Former English rulings are to the latter effect.⁸ In this country the question does not appear to have come up in connection with a letting and subsequent sale, but in similar cases where the agent has introduced a person who subsequently purchases directly from the owner, it has universally been left to the jury whether or not the agent is entitled to a commission, as the efficient cause of the sale.⁹ Mr. Cleave conceives, taking the better view perhaps, that the facts might be found by the jury, but the inference should always be for the judge, since the construction of an agreement is involved.¹⁰

¹ *Debenham v. Warter* (London Times, 12th July, 1907).

² *Millar v. Radford*, 19 T. L. R. 575.

³ *Moses v. Bierling*, 31 N. Y. 462.

⁴ *Kock v. Emmerling*, 22 How. (U. S.) 69.

⁵ *Houghton v. Orgar*, 1 T. L. R. 653.

⁶ See *Lord Watson in Toulmin v. Millar*, 12 App. Cas. 746; and *Lord Esher in Gillow v. Aberdare*, 9 T. L. R. 12.

⁷ *Brandon v. Hanna*, [1907] 2 I. R. 212, 233.

⁸ *Gillow v. Aberdare*, *supra*: *Millar v. Radford*, *supra*.

⁹ *McDonald v. Ortman*, 88 Mich. 645; *Bell v. Electric Co.*, 101 Wis. 320.

¹⁰ See *Thayer, Evidence at the Common Law*, 183 *et seq.*

RESTRAINTS ON ALIENATION IN NEW YORK. — An interesting question arising under the New York Real Property Law is considered in a recent article. *Powers of Sale as Affecting Restraints on Alienation*, by Frederick Dwight, 7 Colum. L. Rev. 589 (December, 1907). Under that law it has been held that a trust is void when it is to continue longer than two lives in being if the trustee has no power to terminate the trust, though he has power to change the form of investment by sale of the *res* at any time.¹ Mr. Dwight argues that the sole basis for the common law rule against restraints on alienation is one of commercial convenience, which demands that land remain alienable so that it may come into the hands of those who will put it to the most profitable use and thereby increase the national wealth. He would give no weight to what he terms the "sentimental" theory of Professor Gray, which rests on the offense given any manly sense of justice by seeing a man enjoy a liberal income while his creditors may remain unpaid. He concludes, therefore, that under the New York law the trust in question, since it allows free transfer of the *res*, meets the true requirement of the rule against restraints on alienation and so should not have been held void.

This conclusion seems entirely correct in so far as the New York law is concerned. In the first place, since the New York statute in some cases expressly allows, even requires,² restraints on alienation which would have been prohibited at common law, it may well be that the "sentimental" theory, whether or not important in the common law, is not to be considered today in New York. In the second place, since the New York law does not allow the *cestui* to alienate, and yet does permit a trust like the one in question, provided the trustee has the additional power to terminate it when he pleases,³ it would appear that certainly in this case the "sentimental" theory is not to be regarded, for the creditors cannot compel the trustee to exercise this power of termination in their favor. But in spite of this conclusion the strength of Mr. Dwight's argument by analogy to the theory of the common law seems questionable. However permissible or even necessary in many cases it may be to rely on the common law to aid in interpreting a statute, yet when, as in this case, the statutory provisions are inconsistent both with each other and with the common law, the analogy is very dangerous. Furthermore, Mr. Dwight's argument against the existence of the "sentimental" theory in the common law does not seem entirely convincing. He argues that if that theory were at the bottom of the rule against restraints on alienation, the rule would apply particularly to sane adults. It is true that the rule applies indiscriminately to sane adults, infants, and lunatics. But it may be said that the law by other well-known rules has given to these weaker classes such protection that in the situation now under discussion they may be treated like other men. And in the case of other persons who, while not insane, might yet as a matter of fact be incapable of efficiently managing their own property, here as in other situations it is against the general policy of the law to make discriminations in their favor. It is, however, not denied that the theory of commercial convenience is a very important basis for the common law rule against restraints on alienation. In fact, Mr. Dwight quotes from Professor Gray himself a sentence⁴ showing the great commercial advantage of the rule. But there can be nothing novel in the co-existence of two equally important but nevertheless independent reasons for the same rule of law.

CONSTITUTION, THE TRUE — SUGGESTIONS TOWARD ITS INTERPRETATION (Continued). *Joseph Culbertson Clayton*. Contending that the federal government should have all the powers inherent in nationality not withheld by the Constitution. 15 Am. Lawyer 281.

¹ *Hawley v. James*, 5 Paige (N. Y.) 318.

² N. Y. Laws of 1896, c. 547, § 83.

³ See *Williams v. Montgomery*, 148 N. Y. 519, 526.

⁴ Gray, *Restraints on Alien.*, § 259.

- CORPORATION LAW, INFLUENCE OF RAILROAD DECISIONS IN. *Richard Selden Harvey*. 15 *Am. Lawyer* 315.
- INTENT, THEORY OF THE ADMISSION OF OTHER ACTS THAN THOSE CHARGED TO SHOW. *Anon.* 5 *The Law* 327.
- JUSTICES OF THE PEACE, THE LIABILITY OF. *W. W. Lucas*. Classifying the cases in which justices of the peace may be liable criminally or civilly. 33 *L. Mag. and Rev.* 22.
- LETTING AND SUBSEQUENT SALE: ESTATE AGENTS' COMMISSIONS. *J. K. F. Cleave*. 33 *L. Mag. and Rev.* 48. See *supra*.
- LIFERENT, GIFTS OF, UNDER POWERS OF APPOINTMENT. *John S. Mackay*. Urging the adoption in Scotland of the English rule that a void remainder under a power of appointment should not invalidate an otherwise good life estate. 19 *Jurid. Rev.* 245.
- MATRIMONIAL DOMICIL. *Anon.* 11 *Bench and Bar* 37. See *supra*.
- METHODS FOLLOWED IN GERMANY BY THE HISTORICAL SCHOOL OF LAW. *Rudolph Leonhard*. 7 *Colum. L. Rev.* 573.
- PATENT LAW. *Edmund Wetmore*. Advocating the creation of a patent court of appeal. 17 *Yale L. J.* 101.
- PEACE CONFERENCE, THE SECOND. *A. H. Charteris*. Discussing, among other results of the Conference, the proposed international prize court. 19 *Jurid. Rev.* 223.
- POWERS OF SALE AS AFFECTING RESTRAINTS ON ALIENATION. *Frederick Dwight*. 7 *Colum. L. Rev.* 589. See *supra*.
- RAILROAD RATE REGULATION. *Herbert S. Hadley*. Discussing a method for determining when a rate is reasonable. 7 *The Brief* 175.
- RAILWAY RATES, THE APPLICATION OF JUDICIAL REMEDIES IN THE REGULATION OF, BY PUBLIC AUTHORITY. *Fred K. Nielsen*. Contending that the Commission should be merely an advisory body. 65 *Cent. L. J.* 385.
- SYSTEMS IN LEGAL EDUCATION. *John Wurts*. Attacking the case system for its lack of preliminary dogmatic teaching. 17 *Yale L. J.* 86.
- TREATIES, FEDERAL, AND STATE LAWS. *Charles Noble Gregory*. A general discussion. 6 *Mich. L. Rev.* 25.

II. BOOK REVIEWS.

THE RULES OF PRACTICE IN THE UNITED STATES COURTS. ANNOTATED. By William Whitwell Dewhurst. New York: The Banks Law Publishing Company. 1907. pp. 775. 8vo.

In the December issue of the *REVIEW*, Professor Kales dolefully pictured the lack of practical equipment with which the student leaves the Harvard Law School. We wonder that he made no point of the Harvard case-book graduate's total ignorance, not only of the nature of the rules of practice, but even of their very existence. For we gratefully confess that those congeries of irritations known as Rules of Court (having all the force of laws) were kept from us by an "ideal" faculty—a jogged memory recalls faintly only Equity Rule 94. But there they are, these rules, in all their minutiae, grim realities of practice, and we are indebted to Mr. Dewhurst for his compilation of the most extensively applicable sets of rules. The collection is not so comprehensive as its title, for it contains only the rules promulgated by the Supreme Court and the circuit courts of appeal, and does not embrace the additional rules adopted by the various district and circuit courts under § 918 of the Revised Statutes.

The old rules of the Supreme Court, and the rules revised at the December term, 1858, are given without annotations. Then follow the present Supreme Court rules; the rules of the circuit courts of appeal, formed by combining the rules of the First Circuit with the variations and additions of the other circuits; the equity rules; the admiralty rules; the rules relating to appeals from the Court of Claims to the Supreme Court; and the general orders in bankruptcy prescribed by the Supreme Court under the Act of 1898. Each of these rules is separately set forth with annotations of its history and source,

followed by summaries of the important or typical cases construing or applying it. There are two indices to each set of rules—a title-and-number index and a subject index. In addition, the *addenda* contain the judiciary acts from the Act of 1789 to date. We miss only the recent act giving the government a limited right of appeal in criminal cases. Besides some straggling forms there are scattered, here and there, unpretentious and incomplete collections of statutes and decisions on the jurisdiction of federal courts, which (particularly in view of Mr. Rose's recent treatise) are of little use.

In so far as Mr. Dewhurst attempted a serviceable edition of the chief body of federal rules of practice, as expressed in rules of courts and not embodied in statutes, he has largely accomplished his purpose. For such an undertaking accuracy, thoroughness, and ease of reference are indispensable. We have had occasion to make practical use of the "Rules" and found it both accurate and complete. Also, after a careful examination, it compares favorably with the treatment of the rules in Rose's Code of Federal Procedure. For instance, the subject indices are even fuller than Rose's. The latter treatise is much wider in scope, welding statutes and rules of court into one comprehensive code; the present book is not therefore displaced by Rose and has an independent usefulness. Yet this compilation is somewhat lacking in scholarliness, arrangement, and analysis. Thus, there might well be a general introductory note on the scope and history of each body of rules. In a future edition, too, the annotations should be topically classified, dealing as they frequently do with different portions of a rule, instead of spreading the cases all in a heap, at times, over ten pages. See pp. 49, 74, 190, 202. We also miss a table of cases, though in a work of this character, particularly in view of the complete indices, it is not indispensable. On the whole, this collection should lighten the irksome drudgery of the federal practitioner.

F. F.

THE LAW OF TAXATION BY SPECIAL ASSESSMENTS. By Charles H. Hamilton. Chicago: George I. Jones. 1907. pp. lxxxv, 937. 8vo.

The true text-book should not be primarily an index to the decisions—that is the peculiar function of the digest. The object of the text-book is rather to set forth, as a digest never can, the fundamental principles of the law of the subject and to show the relations of the decisions to these principles. It cannot be said that "Hamilton on Special Assessments" fully meets this test. The author is to be congratulated for having produced a comparatively exhaustive work on an important subject which has seldom received independent treatment. In its order of arrangement the book moves along the logical line of development: the first part is devoted to a consideration of the nature of special assessments and of the power of the state to levy them; then follow several chapters on the proceedings essential to a valid assessment; and finally, come chapters on the "Duties, Rights, and Remedies of the Taxpayer" and on "Reassessments and Proceedings to Validate Void Assessments." But it is a cause for regret that the mass of material which the author has brought together has not been so used as to result in something more than a useful compilation of authorities. The subject is one which peculiarly demands a writer who can speak "as one having authority," and who can extract from the confused and often contradictory decisions the broad principles which underlie the whole. Yet a reading of Mr. Hamilton's book fails to give an impression of power. The author has not so much mastered the cases, apparently, as he has been mastered by them. It is true that he now and then dissents vigorously from some particular decision, but there is little evidence of effort to bring the disconnected authorities into anything like organic unity.

As an example of this lack of grasp may be noted the treatment of the two leading cases of *Norwood v. Baker* (172 U. S. 269), and *French v. Barber Asphalt Paving Co.* (181 U. S. 324). Though the former is cited twelve and the latter at least seven times, there is no attempt to show exactly how far the later decision restricts the earlier one. The author evidently sympathizes

strongly with the doctrine announced by Mr. Justice Harlan in *Norwood v. Baker*, and several times refers to that doctrine as if it were unquestioned; yet it is clear that he is aware that it has been a good deal shaken by the later cases. The author's failure to distinguish the general from the particular is also seen in the frequent citing of decisions without anything to indicate how far they rest on local enactments and how far on principles of universal application. The author sometimes speaks of doctrines as having been announced by one court or another, but gives no inkling as to whether or not the rules so laid down are applicable in other jurisdictions. In dealing with a subject like this, in which statutory and constitutional provisions are all-important, this failure may sometimes result in seriously misleading the reader, whether he be a student, or a practitioner interested in the law of his own jurisdiction.

A further criticism must be made as to the author's want of discrimination in his citations. A few scattering decisions or even statements of text-writers are often given as the sole support for important propositions. For example, as authority for the statement that "municipal corporations are creatures [of the legislature] and over them it is practically omnipotent," Rosewater on Special Assessments is alone cited (p. 122). So, with reference to the rule that an action will "not lie again [*sic*] a municipality for consequential damages caused by the lawful change of an established grade," six cases are cited (p. 116), all of them from Wisconsin except one from Minnesota. *Callender v. Marsh* (1 Pick. (Mass.) 418), commonly cited as the foundation of the whole doctrine, is entirely ignored. Moreover, the same want of finish extends to the purely mechanical aspect of the book. The division of the notes into sub-headings and paragraphs is often illogical and confusing, and sometimes a large amount of miscellaneous matter which seems to have been forgotten at its proper place is brought together in a long note. Typographical errors, too, are many. Not only are misprints abundant, but the notes occasionally fail to jibe with the text. On p. 172, in the midst of a collection of authorities on the "front-foot" rule, appears this paragraph with nothing to indicate how it relates to the subject:

"This was replevin for a bale of buffalo robes. The question of personal liability was not raised."

Again, on p. 228, it is said that "it has been held that a citizen or lot-owner cannot be compelled to keep it [a sidewalk] free from snow at his own expense, even under the police power, or by fine or penalty imposed by ordinance." *Gridley v. Bloomington* (88 Ill. 554) being cited. This seems a rather summary way of disposing of a difficult question, as to which the weight of authority is probably opposed to the case cited, but, when we turn to the note for some reference to the contrary decisions, we find "But see Pick." and nothing more. No doubt the author has in mind the well-known case of *Goddard, Petitioner* (16 Pick. (Mass.) 504), but a fuller citation would require less exercise of imagination on the part of the reader. It is to be hoped that these and other mechanical imperfections will be remedied in a second edition, as they impose a serious handicap upon a book which is not without value.

H. S. D.

COMMENTARIES ON THE CONSTITUTION OF PENNSYLVANIA. By Thomas Raeburn White. Philadelphia: T. & J. W. Johnson Co. 1907. pp. xxvii, 618. 8vo.

The people of Pennsylvania in the course of their history have had considerable experience in constitution making. William Penn, the proprietor of the Province in colonial times, under his charter from Charles II, had the right to make a form of government by and with the advice and assent of his people. Yet his first plan of government was largely of his own devising, and only in later years were the people able to take an active part. Their final Charter of Privileges, settled upon in the year 1701, was continued until the Revolution, when the patriot party adopted a constitution which was generally regarded as the worst constructed instrument of all the constitutions that

were made in the colonies at that period. It had only one house of legislature, a sort of executive committee instead of a governor, and several other defects. Another constitution was prepared in 1790; another in 1838; another in 1873, under which the people of the state are now living.

All this experience has given us, in Mr. White's book, a very interesting historical introduction. Since he has been a professor in the law department of the University of Pennsylvania, and has had something of a career in reform politics at Philadelphia, he writes from the point of view of a man long accustomed to dealing with public questions. But at the same time his book is thoroughly technical and intended for the practicing lawyer. The cited cases are numerous and well arranged. The chapters and sections bring into view in a clear way all the questions concerning constitutional construction that have been raised in Pennsylvania during the last century. It is by far the most complete and thorough book of constitutional law in Pennsylvania that has yet appeared, and it is doubtful if any other state has produced a book dealing with its constitution in such detail.

S. G. F.

HANDBOOK OF THE LAW OF EVIDENCE. By John Jay McKelvey. Second Edition, Revised. Hornbook Series. St. Paul: West Publishing Company. 1907. pp. xvii, 540.

A review of the first edition of this treatise has already appeared in the *REVIEW*. 11 *HARV. L. REV.* 482. It was then pointed out that though the leading original ideas were those of the late Professor Thayer, the writer deserved credit for his power of statement in assembling them in compact form. This second edition is an enlargement of the first. The chief object of this comment is to indicate the additions. In the chapter on "Judicial Notice," the chapter most extensively revised, the writer inserts a section on the effects produced by the application of the doctrine, in which he discusses to what extent a party will be deemed to have knowledge of a fact judicially noticed. In the same chapter appears a separate section on the right of a party adversely affected to disprove facts which a court may judicially notice. And at the end of this chapter a more exhaustive treatment is made of facts that are required to be noticed. In the chapter on the "Burden of Proof," which so clearly states the correct view that it is the burden of proceeding, not the burden of proof, that shifts, the writer adds a section in which his conclusion that negative allegations have no effect on the burden of proof seems as convincing as his treatment of the general subject in the first edition. The rearrangement of the chapter on "Presumptions" brings out the idea, so well presented in the first edition, that no question of evidence is involved. Also, new examples of presumptions are added. The author shows his sense of proportion in the last chapter on "Writings" by devoting several sections to pictorial evidence, in which he discusses its authentication, materiality, and accessibility.

The arrangement of the book with a short statement of the rule of law at the beginning of a section, followed by its elaboration, is well adapted for ready reference. The author's statements are uniformly succinct, and his elucidation of the principles is remarkably clear in its brevity. In one instance, however, it is believed that this brevity is responsible for a wrong impression as to the existing law. On page 429 is the statement that "upon cross-examination of a witness, questions may be put as to the contents of writings previously made by the witness, without the production of the writings themselves." As a statement of what the law ought to be in order to give to cross-examination its proper function, the above is admirable. But such, it would seem, is not the law in the great majority of jurisdictions in this country. It is true that the contrary doctrine, established by "The Queen's Case" (2 B. & B. 284) has been changed in England by statute, but the change has been followed in very few jurisdictions here. The reader is referred to Wigmore for an exhaustive discussion and the cases. 2 Wigmore. Ev., §§ 1259-1264. With the limited space at his command Mr. McKelvey no doubt intended to emphasize the matter as it should

be on principle, but some indication of this fact should have been made. Of the general excellence of the book as a means of refreshing the memory on the leading topics of evidence, sufficient was said in the review of the first edition. The rearrangement and additions of the new edition should increase the usefulness of the book.

R. T. H

HANDBOOK OF THE LAW OF SURETYSHIP AND GUARANTY. By Frank Hall Childs. Hornbook Series. St. Paul: West Publishing Company. 1907. pp. x, 572. 8vo.

This volume follows out the compact and condensed treatment that is characteristic of the Hornbook Series. It is essentially a summary with a clear statement in many places of what the law is, but with almost no explanation or elucidation of the leading principles. The subject of suretyship lends itself less readily to such handling than almost any other. To this inherent difficulty may doubtless be attributed many of the shortcomings of the work.

With due allowances, however, for the enforced brevity of statement the subject in many instances seems to be unnecessarily confused. It is a fundamental proposition that in strict guaranty the party secondarily liable answers only after default by the principal, whereas in the ordinary case of suretyship the creditor has two independent obligations. This distinction seems apparent to the mind of the author, but it is so important that more pains should have been taken to set forth the consequences flowing from it. Again, the origin of the right to contribution as equitable is correctly stated, yet the author without any explanation refers to it in § 163 as resting on an implied contract. This apparent approval, without comment, of the language which is used in many of the cases, results, in this instance as in many others, in an inconsistency in statement and leaves the reader confused. Where there is less conflict between the origin of rights and their subsequent development, the subject is generally well handled. The leading principles of the right to subrogation are clearly set forth, and in many other instances the treatment is commendable, especially in view of the small compass allotted to it. It is regrettable that, on a branch of the law so little understood, a writer who is able to state some principles so clearly should be hampered by lack of space.

S. ST. F. T.

TRIAL EVIDENCE. By Richard Lea Kennedy. St. Paul: The Keefe-Davidson Co. 1906. pp. vii, 49. 8vo.

The book consists of succinct statements of the general principles of each head of the law of evidence, with references to text-books containing a discussion of them. The statements are clear, the arrangement is good, and there is an adequate index. The book, however, is merely a good sketch-map of the subject.

E. H. A., JR.

A SUPPLEMENT TO A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW, containing the Statutes and Judicial Decisions, 1904-1907. By John Henry Wigmore. Boston: Little, Brown and Company. 1907. pp. xiii, 459. 8vo.

A MANUAL OF PUBLIC INTERNATIONAL LAW. By Thomas Alfred Walker. Cambridge: At the University Press. New York: G. P. Putnam's Sons. 1895. pp. xxviii, 244. 8vo.

COLLECTIVE OWNERSHIP, otherwise than by Corporation or by Means of the Trust. By C. T. Carr. Cambridge: At the University Press. New York: G. P. Putnam's Sons. 1907. pp. xix, 118. 8vo.

DIE TUBERKULOSE, nach ihren juristischen Beziehungen in rechtsvergleichender Darstellung. By B. F. K. Neubecker. Leipzig: Georg Böhme. 1908. pp. 36. 8vo.

REPORTS OF THE AMERICAN BAR ASSOCIATION. Vol. XXXII. **AN ESSAY ON PROFESSIONAL ETHICS.** By George Sharswood. Fifth Edition. Philadelphia: T. & J. W. Johnson Company. 1907. pp. 196. 8vo.

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NO. 5.

COLLATERAL ATTACK ON INCORPORATION.

B. IN GENERAL.

IN a former article¹ dealing with unauthorized corporate action, by hypothesis, (1) the associates had made an attempt to incorporate, resulting in a colorable corporate organization; (2) there was a law authorizing the formation of such a corporation as was attempted; (3) there had been user of some of the powers which such a corporation would possess; and (4) the persons seeking to prevent collateral attack had acted in good faith. This article deals with unauthorized corporate action when some one or more of these conditions are lacking. It also, preliminarily, inquires more fully into the nature of the question underlying the whole subject of unauthorized corporate action.

The law deals with rights, and the corresponding obligations. Every right belongs to a legal unit or units; every obligation binds a legal unit or units.

A human being is, in the nature of things, a unit. A philosopher might entertain a doubt upon this, — *homo* might seem to him merely a convenient word by which to designate a large number of molecules. But the common law judges seem never to have doubted.

A human being may be so circumstanced that the courts do not find it proper to recognize him or her as a legal unit for some, or any, purpose. Thus of slaves, monks, aliens, traitors, lunatics,

¹ 20 HARV. L. REV. 456.

infants, and married women. But, usually, a human being will be recognized as a legal unit.

Two or more persons may unite to accomplish a common purpose. Thus is formed a gild, a partnership, a college, a church, a club. Will these persons, so united, be recognized by the courts as a legal unit?

Undoubtedly, if the sovereign has authorized them to act as a unit. Persons so authorized are said to be incorporated. A corporation *de jure* may be defined as a body of persons legally authorized to act as a unit.¹

But suppose the sovereign has not authorized them. Two questions arise: is there anything, in the nature of things, which prevents the associates from in fact acting as a unit, or which prevents the courts from recognizing them as a legal unit? Are there sufficient reasons of policy to deter the courts from recognizing such a body as a legal unit?

For centuries the leading case on corporations in England was the Case of Sutton's Hospital.² The king, at the petition of Sutton, had granted a charter for the purpose of incorporating the master and governors of a hospital to be founded by Sutton. Sutton thereafter purported to convey land to such corporation. His heir contended that there was no corporation, and that the conveyance was void, but the court held both the incorporation and the deed to be valid.

One objection raised by the heir was that "until there be an actual hospital and poor in it, there cannot be governors of them, for governors ought not to be idle, or as cyphers in algebra."³ The court held that the incorporation of the persons might well precede the foundation of the hospital. We find this language: "And it is great reason that an hospital, &c, in expectancy or intendment, or nomination, should be sufficient to support the name of an incorporation when the corporation itself is only *in abstracto*, and rests only in intendment and consideration of the law; for a corporation aggregate of many is invisible, immortal, and rests only in intendment and consideration of the law. . . . They cannot

¹ A corporation sole is a term, not altogether happy, but established by usage, indicating a person some of whose rights and liabilities are permitted by law to pass to his successors in a particular office, rather than to his heirs, executors, or administrators. Such a "corporation" was unknown in the civil law. This article deals with corporations aggregate.

² 10 Coke 1, 23 (1612).

³ *Ibid.* 23 b.

commit treason, nor be outlawed, nor excommunicate, for they have no souls, neither can they appear in person, but by attorney. . . . A corporation aggregate of many cannot do fealty, for an invisible body can neither be in person nor swear."¹ And, on another point, the report runs: "If the King gives licence to grant to the Mayor and Commonalty of Islington, it is void where there is not any such incorporation, although the inhabitants of Islington be afterwards incorporated by the name of Mayor and Commonalty, because there was no such corporation *in rer' natura* at the time of the grant."²

Blackstone followed Coke: A corporation aggregate "must always appear by attorney, for it cannot appear in person, being, as Sir Edward Coke says, invisible and existing only in intendment and consideration of law. It can neither maintain, nor be made defendant to, an action of battery or such like personal injuries; for a corporation can neither beat nor be beaten, in its body politic. . . . It cannot be executor or administrator, or perform any personal duties; for it cannot take an oath for the due execution of the office."³

Notwithstanding the great respect due to any language used by Coke and Blackstone, it is submitted that the conception of a corporation as an invisible being, existing only in intendment of law, makes for confusion.

A number of men unite to accomplish a common purpose. This body is authorized by the sovereign to act as a unit. There is nothing *in rerum natura* after such authority has been given which was not there before. There is no mysticism about incorporation. The sovereign's charter does not work magic, calling forth a metaphysical being.

When the reasons of policy against recognizing a married woman as a legal unit gave way, the courts, in henceforth recognizing her as a legal unit, did not bring a new thing *in rerum naturam*.

The conclusions which Coke and Blackstone drew from their conception of a corporation have, in the main, ceased to be law.

¹ 10 Coke 32 b.

² *Ibid.* 27 b. In *Bank v. Allen*, 11 Vt. 302, counsel for defendant spoke of a plea of *nul tiel corporation* as equivalent to a plea of *nul tiel persona in rerum natura*.

³ 1 Bl. Comm. 476. Marshall, C. J., used similar language in *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518, 636. In a later case, *Bank v. Dandridge*, 12 Wheat. (U. S.) 64, he held (in a dissenting opinion) that an oral contract cannot be binding upon a corporation, because a corporation has no voice.

The notions that a corporation cannot commit a trespass upon the person and cannot be an executor are altogether exploded.

In the nature of things, units may be so associated together as to form a new unit. The biologist speaks of composite units. Persons, by their own voluntary action, may unite, may in fact form a new, a composite, unit, quite without the sovereign's charter. The charter authorizes what was before unauthorized; it does not make possible what was before impossible.

From very early times the courts have recognized some unchartered bodies of persons as legal units. These bodies were called corporations of common right, or corporations at the common law. Thus the unchartered parishioners of a church were, for some purposes, a corporation at the common law.¹ A corporation at the common law is not to be confounded with a corporation by prescription. If a particular body of men and their predecessors have long acted as a corporation, such long user lays a foundation for the presumption that the sovereign had in ancient times granted them a charter, and that this has been lost. But the parishioners of a particular church did not need to show that they, or their predecessors, had long acted as a corporation. It was enough that it was the common usage for parishioners of any church so to act. There were, then, certain unchartered bodies of persons which were recognized by the courts as legal units; the doctrine is treated as clearly established by both Littleton and Fineux.² Now, if the courts could recognize as legal units some unchartered bodies of persons, they could have so recognized all such bodies. They did not refuse to recognize some unchartered bodies as legal units because of any obstacle arising out of the nature of things.

In *New Orleans Co. v. Louisiana*³ *quo warranto* was brought

¹ See *Y. B.*, 11 Hen. IV, 12; *Y. B.*, 37 Hen. VI, 30; *Y. B.*, 8 Edw. IV, 6; *Co. Lit.* 3 a; *Finch's Law*, c. XVII; *Keilw.* 32 a; 2 *P. Wms.* 125; 4 *Vin. Abr.* 525. For the purposes of this article it would be unprofitable to inquire whether the corporation was, strictly, the whole body of the parishioners, or only the wardens of the church. In *Y. B.*, 12 Hen. VII, 27, *Fineux, C. J.*, held that the parishioners are a corporation at common law for the purpose of protecting the goods of the church, but are not a corporation for other purposes. There had been a note in *Y. B.*, 10 Hen. IV, 3, to the same effect.

² *Y. B.*, 20 Edw. IV, 2 (per Littleton); *Y. B.*, 14 Hen. VIII, 2 (per Fineux).

There is also evidence tending to show that, in early times, the Court of Exchequer, in revenue matters, allowed unchartered bodies of men to be sued, and even to sue, as a unit. *Madox, Firma Burgi*, 85, 91.

³ 180 U. S. 320.

in a state court against the X company, and judgment was rendered that such company had never been legally incorporated. The individuals associated in the company were not named as parties in the proceeding; the company was the sole defendant, being served in the method required for service upon a corporation. And the federal court held this procedure to be proper. If a body of men, not authorized by the sovereign to act as a unit, cannot in fact act as a unit, and cannot be treated by the courts as a legal unit, who was the defendant in this proceeding?

We conclude that there is nothing in the nature of things which prevents a body of persons, unauthorized by the sovereign to act as a unit, from in fact acting as a unit. Legal units are such units in fact as the courts see fit to recognize as legal units, — any unit in fact *may* be so recognized. There is therefore nothing in the nature of things which prevents a court from recognizing as a legal unit a body of persons unauthorized by the sovereign to act as a unit, but in fact acting as a unit.

Are there sufficient reasons of policy to prevent the courts from recognizing such a body as a unit?

Madox states that "anciently a Gild either Religious or Secular could not legally be set-up without the Kings Licence. If any Persons erected a Gild without Warrant, that is, without the Kings leave, it was a Trespass, and they were lyable to be punished for it. For example. In the Twenty-sixth year of K. Henry II (1179), several Gilds in London were amerced to the Crown as Adulterine, that is, as set-up without Warrant from the King."¹

In his chapter "*De Libertates*" Bracton puts the case that the king should grant some liberty "ut si alicui universitati, sicut civibus vel burgensibus vel aliquibus aliis q. mercatum habeant."² It appears, from the chapter as a whole, that he considered this liberty, or franchise, together with various other liberties, to be under the control of the king ("in manu sua"); and that private persons might enjoy it, "sed de gratia ipsius Regis speciali."

Y. B., 49 Edw. III, 3 (1375). A devised lands to B for life, remainder "a deux des meliour homes de la Guild de la Fraternity de Whitawyers en Londres" forever. A died without heirs, and on the death of B the king claimed the land by escheat. The court held that the devise (after B's life estate) was void. Belknap expressed his opinion that, even if the devise had been to "the

¹ Firma Burgi, 26.

² Lib. II, c. 24, fol. 56.

Fraternity," it would not have been good, because the commonalty of London cannot by their own act create a community within the community without the charter of the King. . . . A Fraternity is not a term known to the law, nor can a community exist without a charter.¹ Knyvet, Chancellor, with greater precision of thought, said that this commonalty of the gild, which is not confirmed by the king, could not be adjudged a body capable of taking an estate by purchase.²

Y. B., 20 Edw. IV, 2 (1480). B, alderman of the X gild, brought debt against C, and counted upon an obligation made to A, sometime alderman of the gild, and his successors. Objection that the plaintiff had not shown how the corporation was formed. Objection sustained. Littleton took a distinction between a "corporation of common right" and a gild. The judges were all of opinion that, if suit could be maintained, it would be by the executor of A, and counsel for the plaintiff finally remarked that he had told his client so in the beginning.³

In Y. B., 14 Hen. VIII, 2 (1522), Fineux remarked: "There is a corporation by the Pope alone, as those mendicant brothers who cannot purchase." But Brooke, writing after the Reformation, laid it down that if the Pope purports to create a corporation, "ideo ceo est usurpation et voyd a cest jour et fuit imperpetuum."⁴

These authorities show that from a very early date the sovereign asserted that he, and he alone, could lawfully authorize men to act as a unit. Action by a number of men as a unit, without his authority, was an encroachment upon his prerogative.

In the main, this assertion was supported by the courts. A gild, in many respects, was like a modern town,⁵ and it is easy to see why the courts should acquiesce in the sovereign's assertion of control over such bodies. And the law with respect to gilds became the law generally. The doctrine of corporations at the common law was confined within narrow limits — was regarded as an histor-

¹ "Le comen de Londres ne poet my d'eux mesme faire comen deins cest comen sans chartr le Roy. . . . Fraternity n'est my terme de ley, ne comen ne puit my estre sans chre."

² "Il ne poet pas estre p. la ley q. c. cominalty de la Guilde, q. n'est affirme p. chre le Roy, purroit estre adjudgee un corps de purchace estate."

³ See also Y. B., 22 Edw. IV, 34.

⁴ 1 Brooke, Abr. Corp., 33. See, accord, Dyer 81, pl. 64.

⁵ "And it was well observed, that in old time the inhabitants or burgesses of a town or borough were incorporated when the King granted to them to have *gildam mercatorum*." 10 Coke 30 a. And see Madox, Firma Burgi, 29.

ical exception to the general rule. The claim by the city of London of a right to incorporate was never sanctioned; the claim of the Pope was certainly not sanctioned after the Reformation. We find Blackstone laying it down that the sovereign's consent is absolutely necessary to the erection of any corporation. Such consent, he explains, is implied with respect to corporations at the common law.¹

In the United States the courts have taken a position similar to that of Blackstone.² It has been accepted, as clear and long-settled law, that, without the consent of the state, corporate action is unauthorized.

It follows that if the state complains, in a *quo warranto* or similar proceeding, of unauthorized corporate action, the courts will grant the state appropriate relief. This is clear law.

But suppose that the state does not complain. Ought the courts to allow the question of legal incorporation to be raised collaterally? Is the assumption of the corporate privilege equivalent to a grant of the corporate privilege until the state intervenes?

To put a concrete case. The associates assume to act as a corporation without making any attempt to comply with any law regulating the formation of corporations. They style themselves a corporation, and adopt the forms of procedure usually followed by corporations *de jure*. A contracts with them as a corporation. On a breach of the contract A seeks to hold the associates to full liability, and they seek to confine A to a remedy against the assets, if any, of the corporation.

A contract, say the associates, is a consensual transaction. Out of a consensual transaction can arise only such obligations as the parties intended to arise. We agreed to be bound as a corporation, but we did not agree to be bound as individuals. To bind us

¹ 1 Bl. Comm. 460.

² Corporations at the common law have been but rarely mentioned in American corporate law. The validity, however, of a corporation aggregate at the common law was recognized by the United States Supreme Court, speaking by Mr. Justice Story, in *Terrett v. Taylor*, 9 Cranch 43, 46 (churchwardens), and in *Pawlet v. Clark*, 9 Cranch 292, 328 (same). The validity of a corporation sole at the common law was recognized in the cases just cited (parson), and in *Governor v. Allen*, 8 Humph. (Tenn.) 176 (governor of a state). As to a corporation sole by virtue of a statute, see *Weston v. Hunt*, 2 Mass. 500 (parson); *Brunswick v. Dunning*, 7 Mass. 445 (parson); *Jansen v. Osterlander*, 1 Cow. (N. Y.) 670, 679 (a town officer was a corporation "by implication from the act creating the office").

as individuals would be to make a new contract for us. A must hold us as a corporation, or not at all.

But, answers A, a man's rights are not necessarily as large as his assertions. Legal incorporation, to be sure, would have shielded the associates from full liability, but they never were legally incorporated. They assumed the corporate shield without authority. What they assumed without authority may be stripped from them.

It is childish for them to argue that their liability is bounded by their own intent. If they assumed to do an act with limited liability, and they had no authority to limit their liability, then their liability for that act is unlimited. They did not have authority to limit their liability for the act, but that did not prevent the act from being theirs. It is not their liability, but their partial exemption from liability, which fails. They stand exposed to the consequences of their own acts.

The contention that out of a consensual transaction no obligations can arise except such as the parties intended to arise is not sound. The law frequently imposes upon the parties to a consensual transaction certain obligations not covered by their actual, or expressed, intent. Thus A, owner of a tract of land, may convey a portion of it to B, and A may find that the law imposes an easement for B over the land retained, although he had no intent that B should have such easement.¹ Thus A may sell goods to B, and find that the law imposes upon him a warranty of their quality, although he had no intent to make such warranty.² Thus A may, without authority, assume, as agent of B, to contract with C, and may find that the law imposes upon him personally a liability under the contract.³

The agent does not intend to be bound himself at all, but, if he acts without authority, full liability for the act rests upon him. The associates intend to be bound, but with limited liability. If they are without authority to limit their liability, full liability for the act rests upon them.

The associates reply. It is not fair for A to make this argument. He contracted with us as a corporation. He is estopped to show that we did not have authority to limit our liability.

Estoppel is a term used in the law under a variety of circumstances. A makes a representation which is not true. B acts on

¹ 3 Gray, *Cas. on Prop.*, 2 ed., 345 *et seq.*

² Williston, *Cas. on Sales*, 2 ed., 686 *et seq.*

³ Wambaugh, *Cas. on Agency*, 494 *et seq.*

the representation. Thereafter A is estopped to show that the representation was not true. This is the ordinary case of estoppel by conduct. Now, if A had represented to the associates that they had authority to limit their liability, and had thus induced them to contract, as a corporation, with him, the justice of estopping him from showing that they had no such authority would be obvious. But clearly A, in the case under discussion, made no such representation. The associates themselves made the assertion, the representation.

Is there any basis for estopping A? A takes a lease from B. A does not assert that B has title, and nevertheless A is estopped to deny his landlord's title. Having taken one position, he is not allowed thereafter to take another position logically inconsistent. So, it may be urged, when A consents to deal with the associates as a corporation, he should not be allowed thereafter to take another position logically inconsistent.

There is force in the argument. If a court felt justified in taking note of nothing but the considerations of fairness between the parties to this particular suit, the argument might be allowed to prevail. But it is to be recognized that the courts proceed — and should proceed — with hesitation in estopping a person who has made no misrepresentation. Now, where the estoppel could not rest upon a basis of misrepresentation, where the propriety of raising the estoppel may, even as between the parties themselves, be fairly made the subject of argument, then certainly, if to raise the estoppel would be to produce a result opposed by considerations of public policy, the courts should proceed with great caution.

And to allow the associates to shield themselves from full liability is a result opposed by considerations of public policy. At the present time the chief advantage which associates ordinarily seek to obtain by incorporation is partial exemption from liability for their acts. There are reasons why the state should, under proper regulations, permit this partial exemption; but the policy of freely granting the exemption is not without its dangers. It diminishes the tangible responsibility for acts done. If the exemption is to be enjoyed, it should be enjoyed only when, and as, the state permits it. The soundness of this statement, as a general proposition, is beyond question.

May the courts ever allow it to be enjoyed except in accordance with the regulations of the state? Where the conditions stated in

the opening paragraph of this article are satisfied, — where, in other words, the associates have failed to obtain the exemption only because of some informality or irregularity in their organization, then most, but not all, courts have felt justified in estopping the other contracting party from showing the informality or irregularity.

It is submitted that this is as far as the courts may properly go. If legal incorporation fails for some more serious reason, considerations of public policy outweigh any considerations tending to raise an estoppel against the other contracting party.

Thus, (1) where the associates organize under a law which is unconstitutional; (2) where they organize under a law which permits the formation of some corporations, but not such a corporation as the associates assume to form; (3) where their incorporation failed because of their lack of good faith; (4) where the legal incorporation of the associates has ceased, owing to the lapse of time; and (5) where their assumption of the corporate privilege is naked.¹

It may be urged that where the associates organize under an unconstitutional law, the case is analogous to one where the incorporation has failed because of some irregularity. The difference between the two cases is doubtless one of degree, not of kind. But there is a marked difference in degree between a case where the state has authorized corporate action, on terms, and the associates have failed to avail themselves of this authority only because of some irregularity in their proceedings, and a case where the state has not authorized such corporate action on any terms. The departure from the cardinal principle that the state may control the formation of corporations is much more serious — too serious to be outweighed by any considerations of an estoppel not based on a misrepresentation.

The fact that there was a law on the statute-book which purported to authorize the formation of such a corporation should not be permitted to change the result. The courts cannot, by any proceeding against the legislature, check the enactment of unconstitutional laws. The question of the constitutionality of a law comes before the courts when some person has acted under it, and usually such person has acted in good faith. The courts cannot give effect to any law there may be on the statute-book simply because some person has, in good faith, acted in reliance upon it.

¹ See note A, p. 320, on Full Liability of Associates.

That the result is a hardship to the associates is a consideration to be addressed, not to the court, but to the legislature as a check upon legislation of doubtful constitutionality. The associates who seek to do business with a limited liability may properly be required, at their peril, to ascertain the law. Any doctrine of *de facto* laws is highly dangerous. It weakens the sense of responsibility which should rest upon the legislature carefully to conform to the constitution. It weakens the sense of responsibility which should rest upon all persons to ascertain the validity of laws under which they are proceeding.

With respect to all five cases, it may be urged that, if the state's control over corporations is being assailed, there is a sufficient check through the power of the state to bring *quo warranto* proceedings. The state, however, should not be driven to numerous proceedings in *quo warranto* to vindicate its control. It is to be recognized that the fear of *quo warranto* proceedings is only a very slight check upon unauthorized corporate action. The probability of any action by the state in a particular case is usually remote; and the consequences of a judgment are usually not very serious,—it is feasible to arrange for the conduct of the enterprise in some new way. The check is, in practice, not sufficient. To a certain extent, at least, the more effective check by collateral attack is needed. It is to be noted that when the question first arose the courts unhesitatingly permitted collateral attack. In England there is not now, and never has been, any well-developed doctrine to the contrary.¹

So much as to the full liability of the associates. But a question on a contract between the associates and A may arise in another form. A, for example, may have borrowed money from the associates, as a corporation, and when they sue, as a corporation, for repayment, he may seek to defend on the ground that they were not authorized to act as a corporation. Here A seeks, not to impose, but to avoid, liability; he seeks to repudiate his own obligation; it is not too much to say that his position is repugnant to common honesty. These considerations are of great weight. A very effective check upon unauthorized corporate action has been imposed by exposing the associates to full liability; is there now need of this further check?

¹ See note B, p. 326, on English Authorities.

If A promises B to pay him one thousand dollars if he will murder C, and B murders C, it is fair, as between A and B, that A should pay the agreed sum. But of course the courts would give no relief to B. It is proper to attach greater weight to the illegality of such a contract than to the considerations of fairness between the parties. Now the contract between the associates and A may be such that it would not be enforced even if made by the associates as partners. Then, *a fortiori*, it will not be enforced when they make it as a corporation.¹

The state, by its constitution or laws, may have taken affirmative action, indicating an intensified intent to prevent corporate action, for some or any purpose, except on compliance with specified requirements. For example, it may have forbidden any corporation, not organized in a specified manner, to engage in the business of banking. This affirmative action may, in the judgment of the courts, prevent them from giving legal validity to contracts which are prohibited by it.²

Assume that the considerations stated in the preceding two paragraphs are not present. Is all unauthorized corporate action illegal? That depends on how the term "illegal" is defined. Any action not legally authorized may be said to be "illegal." But this takes much of the sting out of the term. We do not advance, — it only amounts to saying that unauthorized corporate action is unauthorized.

Unauthorized corporate action is not so strongly to be condemned that legal validity is never to be given to it. If the conditions stated in the opening paragraph of this article are satisfied, the American courts are unanimous in not allowing A to avoid liability on the ground that the associates had no authority to act as a corporation.³

Where these conditions are not satisfied, the courts have not been unanimous. Suppose that there is no law authorizing such a corporation as the associates attempted to form. Some courts have then felt themselves obliged to allow A to defend. Their reasoning has taken two forms: (1) A cannot be prevented from raising the question of authority unless he is estopped, and there can be no estoppel on a question of law; (2) there can be no corporation *de facto* unless there can be a corporation *de jure*.

¹ See *Schuetzen Bund v. Agitations Verein*, 44 Mich. 313.

² See *Medill v. Collier*, 16 Oh. St. 599.

³ 20 HARV. L. REV. 476, n. 33, third division.

(1) The contention that there may not be estoppel on a question of law falls flat. There may be estoppel by record on a question of law.¹ There may be estoppel by deed on a question of law.² There may be estoppel by simple contract on a question of law, — the tenant is estopped, though the lease was not under seal, and whether the landlord has title is a question of law.³ A, wishing to buy a note from B, inquires of C, the maker, if he has any defense. C replies that he has not, and is estopped thereafter to assert a defense.⁴ There is nothing in the general principles of the law of estoppel which makes it improper to estop A to show that there was no law under which the associates could have obtained authority for such corporate action.⁵

(2) It is said that there can be no corporation *de facto* unless there can be a corporation *de jure*.⁶

In *United States Bank v. Stearns*⁷ the defendant pleaded the general issue. As the law in New York then stood, this put the plaintiff to proof of its corporate existence. The trial judge decided that the charter need not be produced, because the act of incorporation of the Bank of the United States was a public act. The Supreme Court held this to be error. "The least proof which has been held sufficient is the production of an exemplification of the act incorporating the plaintiffs, and evidence of user, under their charter." The case is pertinent, therefore, to show what proof is necessary to establish that a body is a corporation *de jure*.

In *Methodist Church v. Pickett*⁸ the defendant, sued on a promise to pay money to the plaintiff, was not allowed to defend on the ground that there were irregularities in its organization. Selden, J., said: "It has been repeatedly held that as against all persons who have entered into contracts with bodies assuming to act in a corporate capacity, it is sufficient for such bodies to show themselves to be corporations *de facto*. This cannot be done by simply show-

¹ The doctrine of *res judicata* is not confined to questions of fact.

² *Blackburn v. Bell*, 91 Ill. 434, 444; *Hills v. Laming*, 9 Exch. 256.

³ *Taylor, Landl. & Ten.*, 9 ed., § 629.

⁴ The authorities are collected in 16 Cyc. 753, n. 50.

⁵ For further instances in which the courts have raised an estoppel on a question of law, see *Perryman v. Greenville*, 51 Ala. 507; *Strosser v. Fort Wayne*, 100 Ind. 443; *Burlington v. Gilbert*, 31 Ia. 356; *R. R. Co. v. Stewart*, 39 Ia. 267; *Ferguson v. Landram*, 5 Bush. (Ky.) 230; *Motz v. Detroit*, 18 Mich. 495; *People v. Murray*, 5 Hill (N. Y.) 468; *State v. Mitchell*, 31 Oh. St. 592; *Tone v. Columbus*, 39 Oh. St. 281.

⁶ See *Clark v. American Co.*, 165 Ind. 213, 216, and cases cited.

⁷ 15 Wend. (N. Y.) 314.

⁸ 19 N. Y. 482 (1859).

ing that they have acted as corporations for any period of time, however long. Two things are necessary to be shown in order to establish the existence of a corporation *de facto, viz.*: (1) the existence of a charter, or some law under which a corporation with the powers assumed might lawfully be created; and (2) a user by the party to the suit, of the rights claimed to be conferred by such charter or law." The only authority cited for this proposition was *United States Bank v. Stearns*. The remark that a corporation *de facto* cannot exist unless there is a law under which such a corporation might lawfully be created was in no wise necessary to the decision of the case at bar.

If there is a law authorizing associates, upon the performance of certain conditions, to act as a unit, associates who have not performed the conditions and have not therefore availed themselves of the law, can in fact act as a unit. So much may, on the authorities, be taken as established. But it is difficult to see how the mere existence of such a law was necessary in order that such action could in fact be taken, or how the absence of such a law can prevent the associates from in fact taking such action. The matters required to be shown in order to prove that corporate action is authorized have no bearing whatever on the possibility of unauthorized corporate action. There must be a law in order that corporate action should be authorized. It does not follow that there must be a law in order that there should in fact be unauthorized corporate action.

Following in the wake of *Methodist Church v. Pickett*, many courts have given a restricted, technical meaning to the phrase "corporation *de facto*." But any body of men which in fact assumes to act as a corporation may, and should, be termed a corporation *de facto*. In *Y. B., 49 Edw. III, 3 (1375)*, apparently the earliest reported case bearing upon our subject, there was no law under which the gild could have been incorporated, but Brooke, C. J., commenting on the case, speaks of the gild as "a corporation made by the citizens."¹ Wherever there is unauthorized corporate action there is a fact to which the courts *can* give legal validity. There is nothing in the nature of things to bar the courts from giving legal validity to all unauthorized corporate action. They may be deterred from so doing by reasons of policy, but it is submitted that, where A seeks to avoid liability on the ground that

¹ Brooke, *Abr. Corp.*, 15.

there was no law under which the associates could have obtained authority for their corporate action, the considerations of fairness between the parties may safely be allowed to outweigh the objections to giving validity to unauthorized action.¹

So much as to contracts with the associates as a corporation. But the person seeking to make collateral attack may not have so contracted. Then the considerations of fairness between the parties drop. The associates are now seeking affirmatively to assert against a stranger a privilege, or right, which they do not possess. To permit this is repugnant to principles underlying our whole law. The chief object of the preceding article on this subject was to show that, even where the conditions stated in the opening paragraph of the article are satisfied, collateral attack should be allowed if the associates seek to assert the corporate privilege to the prejudice of a stranger. If there are not these requisites, *a fortiori*, collateral attack should be allowed.²

Viewing the subject as a whole, it is seen that whether or not collateral attack is to be permitted depends not so much on logical deductions as on the exercise of a sound judgment. Opposing considerations must be weighed. The law, therefore, cannot be pictured in bright lines. Some large features, however, emerge. (1) Collateral attack should be permitted to a stranger to whose prejudice the associates seek to assert a right dependent upon incorporation, — and this whether there are the technical requisites of the *de facto* doctrine, or not. (2) The associates should not be shielded from full liability where their legal incorporation failed for some reason more serious than an informality or irregularity in their organization. (3) These effective checks by collateral attack being established, the courts may, in many other instances, properly deny such attack, — and this whether there are the technical requisites of the *de facto* doctrine, or not. Thus, notably, where A seeks to avoid liability on the ground that there was no law under which the associates could have obtained authority for their corporate action.

In closing, attention is called to the form of the English statute of 1900.³ The advantage of this form of statute, in preventing liti-

¹ See note C, page 329.

² For further questions as to collateral attack, see note D, page 329.

³ See the close of note B, p. 329, on English Authorities.

gation, is obvious. But it should be coupled with provisions defining the liability of the associates for false statements.

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NOTE A.

Full Liability of Associates.

In *Fay v. Noble*, 7 Cush. (Mass.) 188, certain persons had been incorporated by a special act, imposing no conditions precedent to incorporation. The associates acted under the law, but did not, in their organization, conform to certain provisions. The trial court ruled that, in consequence, the associates became partners, and an exception to this ruling was sustained by the full bench. Bigelow, J., said that a corporation or its members cannot be made subject to the liabilities of a copartnership, in the absence of all statutory provisions imposing such liabilities. He found on examining the statute that the officers and members of a corporation were made individually liable for its debts in case of non-compliance with certain requisitions, "but no provision is made by which such individual liability attaches by reason of any omission to organize in the manner prescribed by law. . . . The statute, it is true, prescribes the mode of organization, but it annexes no penalty or liability to the neglect or omission to comply with it."

The learned judge then proceeded to say that if, owing to the failure to organize properly, the proceedings of the corporation were void, "there was no principal to appoint an agent. It is a familiar principle of law, that a person who acts as agent without authority or without a principal, is himself regarded as a principal, and has all the rights and is subject to all the liabilities of a principal. If a person purporting to act as agent of a corporation which had no valid legal existence makes contracts and does other acts as its agent, he becomes the principal, and is personally liable therefor. . . . Fuller [the alleged agent] was not the agent of a copartnership, for none existed; he was not the agent of individuals, as such, because he was not authorized so to act; he was not the agent of the West Boston Iron Company, because if the court were right in deciding that it had never organized, and that its proceedings were void, it never had the power to appoint him agent."

It seems clear that the West Boston Iron Company was a corporation *de jure*, and that the irregular organization was, at most, a cause for forfeiture of incorporation. On the second trial of the cause no question was made but that the company was a corporation *de jure* (12 Cush. 1). Therefore the only question was whether or not, by non-compliance with statutory provisions, the members of a corporation *de jure* incurred individual liability. This is the question primarily discussed by the court. It has, obviously, nothing to do with collateral attack upon incorporation.

The court, however, apparently was of opinion that if certain persons assumed without legal authority to act as a corporation, and appointed A an agent to the corporation, and A contracted as agent for the corporation, full liability under the contract fell upon A and no liability fell upon the associates. "There was no principal." But if a body of men — though not legally authorized to act as a unit — direct A to act for them as a body, and A does so act, then this body, this corporation *de facto* is the principal. It is flying in the face of the facts to say that A is acting without a principal. Such a conclusion can be reached only by reverting to the conception of a corporation as a being called forth by the magic of a charter.

And even if we concede that there was no principal, the associates should be held on another ground. For A to contract as agent, when he had no principal, was a wrong. The associates, by representing to him that there was a corporation, and

instructing him to contract for that corporation, induced the wrong. They would therefore be liable for the wrong, just as a person who procures the commission of a trespass is liable for the trespass. See *Pollock, Torts*, 7 ed., 74; *Trowbridge v. Scudder*, 11 Cush. (Mass.) 83, 86; *Medill v. Collier*, 16 Oh. St. 599, 611.

In *Utley v. Tool Co.*, 11 Gray (Mass.) 139, Bigelow, J., said: "We are not called on now to say whether the plaintiffs have any remedy for the collection of their debt against those who participated in the transactions connected with the attempted organization of the supposed corporation."

In *First Bank v. Almy*, 117 Mass. 476, there is a dictum by Gray, C. J.: "Even if the organization of the corporation had been defective, there would have been great difficulty in holding the associates to be subject to the liability of co-partners which they never intended to assume."

Morawetz says (Priv. Corp., 2 ed., § 748): "If an association assumes to enter into a contract in a corporate capacity, and the party dealing with the association contracts with it as if it were a corporation, the individual members of such association cannot be charged as parties to the contract, either severally or jointly, or as partners. . . It is clear that the members of the association do not agree to be parties to the contract severally or jointly. They do not agree to be bound as partners." This reasoning was applied in *Planters Bank v. Padgett*, 69 Ga. 159, and was approved by dicta in *Canfield v. Gregory*, 66 Conn. 9, 17, and in *Miller v. Coal Co.*, 31 W. Va. 836, 840.

Viewing the authorities as a whole, however, they establish the proposition that the associates may be held to full liability on a contract, notwithstanding that they intended to contract only as a corporation and therefore to subject themselves only to limited liability. There are decisions to that effect in *Christian Co. v. Fruitdale Co.*, 121 Ala. 340; *Garnett v. Richardson*, 35 Ark. 144, 146; *Forbes v. Whittemore*, 62 Ark. 229, 234; *Taylor v. Branham*, 35 Fla. 297, 302; *Duke v. Taylor*, 37 Fla. 64, 75; *Pettis v. Atkins*, 60 Ill. 454; *Bigelow v. Gregory*, 73 Ill. 197; *Kaiser v. Lawrence Bank*, 56 Ia. 104; *McLennan v. Hopkins*, 2 Kan. App. 260; *Cincinnati Co. v. Bate*, 96 Ky. 356; *Field v. Cooks*, 16 La. Ann. 153; *Chaffe v. Ludeling*, 27 La. Ann. 607; *Williams v. Hewitt*, 47 La. Ann. 1076; *Eaton v. Walker*, 76 Mich. 579, 590; *Johnson v. Corser*, 34 Minn. 355, 357; *Martin v. Fewell*, 79 Mo. 401; *Furniture Co. v. Crawford*, 127 Mo. 356, 364; *Cleaton v. Emery*, 49 Mo. App. 345; *Davidson v. Hobson*, 59 Mo. App. 130; *Abbott v. Omaha Co.*, 4 Neb. 416; *Bank of Watertown v. Landon*, 45 N. Y. 410; *Medill v. Collier*, 16 Oh. St. 599, 612; *Guckert v. Hacke*, 159 Pa. St. 303; *N. Y. Bank v. Crowell*, 177 Pa. St. 313; *Haslett v. Wotherspoon*, 2 Rich. Eq. (S. C.) 395; *Empire Mills v. Alston Co.*, 15 S. W. 505 (Tex.); *Mitchell v. Jensen*, 29 Utah 346; *Bergeron v. Hobbs*, 96 Wis. 641; *Slocum v. Head*, 105 Wis. 431; *Owen v. Shepard*, 59 Fed. 746; *Wechselberg v. Flour City Bank*, 64 Fed. 90; *Davis v. Stevens*, 104 Fed. 235. There are clear dicta to the same effect in *Stafford Bank v. Palmer*, 47 Conn. 443; *Lawler v. Murphy*, 58 Conn. 294, 313; *Loverin v. McLaughlin*, 161 Ill. 417, 435; *Sentell v. Rives*, 48 La. Ann. 1214; *State v. Debenture Co.*, 107 La. 562, 570; *Michigan v. How*, 1 Mich. 512; *Hill v. Beach*, 1 Beasl. (N. J.) 31, 36; *Fuller v. Rowe*, 57 N. Y. 23, 26. See also *Coleman v. Coleman*, 78 Ind. 344; *Flagg v. Stowe*, 85 Ill. 164; *Matter of Browne Co., Ltd.*, 106 La. 486; *Montgomery v. Forbes*, 148 Mass. 249; *Booth v. Wonderly*, 36 N. J. L. 250; *Worthington v. Griesser*, 77 N. Y. App. Div. 203; *Bank v. Hall*, 35 Oh. St. 158; *Ridenour v. Mayo*, 40 Oh. St. 9; *Brundred v. Rice*, 49 Oh. St. 640; *Vanhorn v. Corcoran*, 127 Pa. St. 255; *McGrew v. City Produce Exchange*, 85 Tenn. 572; *Smith v. Ins. Co.*, 14 Fed. 399.

If the conditions stated in the opening paragraph of the article are satisfied, the associates have usually been shielded from full liability to the other contracting party, but not on the reasoning that no liability might be imposed upon them except such as they had intended to assume. *Snider's Co. v. Troy*, 91 Ala. 224; *Cory v. Lee*, 93 Ala. 468; *Owensboro Co. v. Bliss*, 132 Ala. 253; *Humphreys v. Mooney*, 5 Colo. 282; *Doty*

v. Patterson, 155 Ind. 60; *Finnegan v. Noerenberg*, 52 Minn. 239; *Johnson v. Okersrom*, 70 Minn. 303; *Kleckner v. Turk*, 45 Neb. 176; *Hogue v. Capital Bank*, 47 Neb. 929; *Larned v. Beal*, 65 N. H. 184; *Stout v. Zulick*, 48 N. J. L. 599; *Vanneman v. Young*, 52 N. J. L. 403; *Rowland v. Meader Co.*, 38 Oh. St. 269; *Mason v. Stevens*, 16 S. D. 320; *Shields v. Clifton Co.*, 94 Tenn. 123; *Tennessee Co. v. Massey*, 56 S. W. 35 (Tenn.); *American Co. v. Heidenheimer*, 80 Tex. 344; *Clausen v. Head*, 110 Wis. 405; *Gartside Co. v. Maxwell*, 22 Fed. 197. See also *Canfield v. Gregory*, 66 Conn. 9, 17; *Clark v. Richardson*, 31 S. W. 878 (Ky.); *Sentell v. Hewitt*, 50 La. Ann. 3; *Merchants' Bank v. Stone*, 38 Mich. 779; *American Co. v. Bulkley*, 107 Mich. 447; *Love v. Ramsey*, 139 Mich. 47; *Richards v. Minnesota Bank*, 75 Minn. 196; *Whitford v. Laidler*, 94 N. Y. 145, 151; *Wentz v. Lowe*, 3 Atl. 878 (Pa.).

For the effect of special statutory provisions, see *Loverin v. McLaughlin*, 161 Ill. 417, 434 (*cf.* 83 Ill. App. 643); *Eisfeld v. Kenworth*, 50 Ia. 389; *Marshall v. Harris*, 55 Ia. 182; *Clegg v. Hamilton Co.*, 61 Ia. 121; *Heuer v. Carmichael*, 82 Ia. 288 (*cf.* *Bank of Davenport v. Davies*, 43 Ia. 424, followed in *Jessup v. Carnegie*, 80 N. Y. 441); *Sweeney v. Talcott*, 85 Ia. 103; *Thornton v. Balcom*, 85 Ia. 198; *Stokes v. Findlay*, 4 McCrary (U. S. C. C.) 205.

If the state has taken affirmative action and by its constitution or laws has indicated an intensified intent not to permit corporate action, except on compliance with stated requirements, then, although the conditions stated in the opening paragraph of the article are satisfied, the courts may hold the associates to full liability. *Medill v. Collier*, 16 Oh. St. 599, 612 (associates engaged in the banking business without making a required deposit of securities; it is not entirely clear whether the court considered that the associates had not been incorporated, or that they were engaged in an *ultra vires* transaction; apparently the court would have reached the same result on either supposition).

There are some decisions holding the associates to full liability to the other contracting party, although the conditions stated in the opening paragraph of the article are satisfied and there has been no such affirmative action by the state. *Garnett v. Richardson*, 35 Ark. 144; *Bigelow v. Gregory*, 73 Ill. 197; *Kaiser v. Lawrence Bank*, 56 Ia. 104; *Williams v. Hewitt*, 47 La. Ann. 1076 (full consideration of the question of estoppel); *Bergeron v. Hobbs*, 96 Wis. 641; *Wechselburg v. Flour City Bank*, 64 Fed. 90. See also *Johnson v. Corser*, 34 Minn. 355, 357; *Abbott v. Omaha Co.*, 4 Neb. 416. *Cf.* *Granby Co. v. Richards*, 95 Mo. 106, with the reasoning of the court in *Hurt v. Salisbury*, 55 Mo. 310.

If the law under which the associates organized is unconstitutional, the court, in *Michigan v. How*, 1 Mich. 512, said that the associates would be exposed to full liability. "When the law under which such exemption is claimed is unconstitutional, the exemption itself ceases to exist." There is a dictum to the same effect in *Burton v. Schildbach*, 45 Mich. 504, 511, and a decision in *Eaton v. Walker*, 76 Mich. 579, 590. "Obligors are bound, not by the style which they give to themselves, but by the consequences which they incur by reason of their acts." The court would apparently have held the associates even if the plaintiff had admitted that he dealt with them as a corporation. See also *Clark v. American Co.*, 165 Ind. 213, 216.

In *Planters Bank v. Padgett*, 69 Ga. 159, a court assumed, by a judgment, to incorporate associates. The judgment was held to be void, but the associates were shielded from full liability on the authority of *Morawetz* (§ 748, *supra*).

In *Richards v. Minnesota Bank*, 75 Minn. 196, the name of a corporation *de jure* was changed. Held, that, even if the act making the change was unconstitutional, persons contracting with the corporation in such new name could not hold the stockholders to full liability.

Where the law under which the associates organized did not authorize such a corporation as they attempted, they were held to full liability in *Davis v. Stevens*, 104 Fed 235 (*Mason v. Stevens*, 16 S. D. 320, is not inconsistent with this principle). To the same effect are *Booth v. Wonderly*, 36 N. J. L. 250 (a charter authorizing a business to be carried on in Trenton was used in conducting a business at Jersey City; apparently no stock was subscribed; the persons who assumed to act as directors were held to full liability); *Ridenour v. Mayo*, 40 Oh. St. 9 (trustees of a savings bank used name of bank in carrying on a general banking business). See also *Vredenburg v. Behan*, 33 La. Ann. 627; *Hill v. Beach*, 1 Beasl. (N. J.) 31, 36 (one ground of the decision was that the laws of New York did not authorize a corporation to be formed by the residents of another state to do business only in that other state).

In *Merchants' Bank v. Stone*, 38 Mich. 779, Marston, J., dissenting, held, that a statute authorizing manufacturing corporations did not authorize lumbering companies, and that the associates were exposed to full liability. The grounds on which the majority proceeded, in protecting the associates, are not clear.

Where associates are incorporated by State M, they cannot act as a corporation in State N, unless the courts of State N see fit to give validity to the incorporation. Where the courts of State N have refused to give validity to a foreign incorporation, they have held the associates to full liability on their contracts. *Taylor v. Branham*, 35 Fla. 297; *Cleaton v. Emery*, 49 Mo. App. 345; *Davidson v. Hobson*, 59 Mo. App. 130; *Empire Mills v. Alston Co.*, 15 S. W. 505 (Tex.). See also *Duke v. Taylor*, 37 Fla. 64; *Montgomery v. Forbes*, 148 Mass. 249; *Hill v. Beach*, 1 Beasl. (N. J.) 31, 36; *Owen v. Shepard*, 59 Fed. 746, 749. It may be noted in passing that the present tendency of the courts is to go far in giving validity to a foreign incorporation. See *Demarest v. Flack*, 128 N. Y. 205; *Second Bank v. Hall*, 35 Oh. St. 158.

Where the associates have not acted in good faith, a preliminary question arises. It seems always to have been the law in this country that a charter obtained by fraud was voidable, and not void (as to the English law, see *Morgan v. Seaward*, 2 M. & W. 544, 561; *Macbride v. Lindsay*, 9 Hare, 574, 583; *Robinson v. London Hospital*, 22 L. J. Ch. 754, 757). Thus, if the legislature is induced by fraud to pass a special act of incorporation, the corporation comes into being, and the fraud is only a cause of forfeiture by the state. *Charles River Bridge v. Warren Bridge*, 7 Pick. (Mass.) 344, 370. Similarly, if the legislature has by a special or general law authorized a designated official or body to issue a charter or a certificate (which is made conclusive evidence of incorporation) upon the performance of conditions precedent, and the official or body is induced by fraud to issue such charter or certificate. *Rice v. Bank of Commonwealth*, 126 Mass. 300 (Mass. Laws of 1903, c. 437, § 12, provides that the certificate of the Secretary of State "shall have the force and effect of a special charter"); *Nat'l Bank v. Rockefeller*, 195 Mo. 15, 42 (the statute provides that the certificate of the Secretary of State "shall be taken by all courts of this State as evidence of the corporate existence of such corporation"; the court held that the certificate was equivalent to a special act of the legislature; whether this was a sound construction of the statute, *quære*); *Centre Co. v. M'Conaby*, 16 Serg. & R. (Pa.) 140, 1 Pen. & W. (Pa.) 426, 431; *Travaglini v. Societa Italiana*, 5 Pa. Dist. 441; *German Ins. Co. v. Strahl*, 13 Phila. (Pa.) 512. See also *Pattison v. Albany Ass'n*, 63 Ga. 373; *Lafin Co. v. Sinsheimer*, 46 Md. 315; *U. S. Vinegar Co. v. Schlegel*, 143 N. Y. 537; *Cochran v. Arnold*, 58 Pa. St. 399; *Wells Co. v. Gastonia Co.*, 198 U. S. 177, 185. Similarly, if the designated official or body is induced by fraud to do an act the performance of which is one of the conditions precedent to incorporation. *Duke v. Cahawba Co.*, 16 Ala. 372; *Litchfield Bank v. Church*, 29 Conn. 137, 148; *Jones v. Dana*, 24 Barb. (N. Y.) 395; *Tar River Co. v. Neal*, 3 Hawks (N. C.) 520.

Wherever the legislature has authorized the formation of a corporation upon the performance of certain conditions precedent, the courts must necessarily determine

whether the legislature intended to require a certain mental state in the corporators as one of these conditions. Considering the difficulty of proof on such a point, the courts may incline against such a construction of the law. See *Importing Co. v. Locke*, 50 Ala. 332, 334; *Niemeyer v. Little Rock Ry.*, 43 Ark. 111, 120; *Aurora Co. v. Lawrenceburgh*, 56 Ind. 80, 87; *Lincoln Ass'n v. Graham*, 7 Neb. 173; *Atty.-Gen. v. Stevens*, Saxt. Ch. (N. J.) 369, 378; *Nat'l Docks Co. v. Central R. R.*, 32 N. J. Eq. 755; *Terhune v. Midland Co.*, 38 N. J. Eq. 423; *Atty.-Gen. v. Am. Tobacco Co.*, 55 N. J. Eq. 352, 369, *aff'd* 56 N. J. Eq. 847; *Buffalo Co. v. Hatch*, 20 N. Y. 157, 159; *Wellington Co. v. Cashie Co.*, 114 N. C. 690; *Cochran v. Arnold*, 58 Pa. St. 399, 405; *Windsor Co. v. Carnegie Co.*, 204 Pa. St. 459, and cases cited. *Cf.* *Christian Co. v. Fruitdale Co.*, 121 Ala. 340, 345; *Montgomery v. Forbes*, 148 Mass. 249; *Augir v. Ryan*, 63 Minn. 373; *Hill v. Beach*, 1 Beasl. (N. J.) 31, 36; *Jersey City Co. v. Dwight*, 29 N. J. Eq. 242 (the learned vice-chancellor who decided this case assumed, 46 N. J. Eq. 116, that it could not stand with 32 N. J. Eq. 755. But see 49 N. J. Eq. 329, 335); *Elizabeth Co. v. Green*, 49 N. J. Eq. 329 (by five dissenting judges. Whether the majority was opposed on this point does not appear. The decision is explained in 52 N. J. Eq. 111, 144, on a ground consistent with this opinion by the dissenting judges); *Farnham v. Benedict*, 107 N. Y. 159, 169; *Brundred v. Rice*, 49 Oh. St. 640; *McGrew v. City Produce Exchange*, 85 Tenn. 572; *Le Warne v. Meyer*, 38 Fed. 191. See also *Carey v. Cincinnati Co.*, 5 Ia. 357; *Chicora Co. v. Crews*, 6 S. C. 243, 275. In *New Orleans Co. v. Louisiana*, 180 U. S. 320, 330, *Peckham, J.*, said: "If not created for a lawful purpose, the company was not created at all." There is a dictum to the same effect by Lord Herschell in *Salomon v. Broderip*, [1897] A. C. 22, 43.

The legislature may, however, require a certain mental state as a condition precedent to incorporation. Thus it may require that certain subscriptions or payments be made in good faith. And, it is submitted, where the legislature requires that certain statements be made and filed or recorded in a public office, the courts should hold that the legislature intended to require that such statements be made in good faith.

Assume that such requirement is made. For example, the legislature requires the associates to state the amount of capital stock subscribed and paid in. The associates make statements which are false, and which are known to be false. If incorporation fails because such statements are not made in good faith, it would seem to be clear that the associates should be held to full liability on their contracts. To say that A, the other contracting party, is estopped to show that the associates are not incorporated when the incorporation has failed because the associates made a representation which they knew was not true, and A has acted on it to his hurt, would be contrary to the principles underlying the law of estoppel. There is no equity in estopping A under these circumstances; the equity is all the other way. Here then is a case where justice between the parties and public policy both require that the associates be held to full liability. One may be permitted to be astonished at a doctrine which protects the associates,—it is contrary to the manner in which the courts deal with fraud in every other branch of the law.

In *Gow v. Collin*, 109 Mich. 45, the plaintiff alleged that the statements of the associates in their certificate of incorporation respecting their capital were false, and that he contracted with them relying on these statements; he sought to hold them to full liability. A demurrer to the bill was sustained. "The company, in form, was duly incorporated, was recognized by the public authorities, and filed its annual reports, and did business as a corporation. The complainants dealt with it as a corporation." In substance, this was all the consideration which the court gave to the point. The decision is the more remarkable when compared with *Doyle v. Mizner*, 42 Mich. 332.

In *Cochran v. Arnold*, 58 Pa. St. 399, the reasoning of the court goes as far as the decision in *Gow v. Collin*. But the statements, although technically untrue, do not seem

to have been made in bad faith, and, in any event, the other contracting party knew all the facts.

Laffin Co. v. Sinsheimer, 46 Md. 315. From portions of the opinion it would appear that the court dealt with the case as one of incorporation secured by fraud. But elsewhere (p. 320) it says that the validity of the incorporation cannot be collaterally attacked "by proving *aliunde* the certificate of its incorporation that certain prerequisites of the law had not been in good faith complied with."

In *Webb v. Rockefeller*, 195 Mo. 57, the court held that A, who had contracted with the associates, could not recover in tort because he was not of the class intended to be influenced by the representations as to their capital.

On the other hand, in *Montgomery v. Forbes*, 148 Mass. 249, the defendant falsely stated that the business of the corporation was to be carried on in a certain state; he thereafter purchased goods in the name of the corporation, and was held to full liability. There is a dictum to the same effect in *Gartside Co. v. Maxwell*, 22 Fed. 197. See also *Cleaton v. Emery*, 49 Mo. App. 345; *Davidson v. Hobson*, 59 Mo. App. 130; *Hill v. Beach*, 1 Beas. (N. J.) 31, 36; *Booth v. Wonderly*, 36 N. J. L. 250. In *Christian Co. v. Fruitdale Co.*, 121 Ala. 340, 345, the question was whether or not the associates were to be held to full liability to one who had contracted with them not knowing that they assumed to act as a corporation. The evidence went to show that affidavits as to the capital were false. "We are, therefore, clear to the conclusion . . . that all the evidence . . . tending to show that the incorporation . . . was a fraud and a pretense intended to cover a partnership business, to shield the partners from individual liability and to set up a straw corporation without capital and without assets should have been allowed to go to the jury."

In *Brundred v. Rice*, 49 Oh. St. 640, 650, where a corporation was not organized in good faith, but for the purpose of consummating an illegal agreement, the associates were held accountable for moneys nominally paid to the corporation. "The act of incorporating can be of no avail to them as a defense." To the same effect is *McGrew v. City Produce Exchange*, 85 Tenn. 572.

If the attempt at incorporation is not made in good faith, but persons purchase the stock in good faith, they should not be exposed to full liability to those who have contracted with the corporation. *American Co. v. Heidenheimer*, 80 Tex. 344. See also *Minor v. Mechanics Bank*, 1 Pet. (U. S.) 46, 66.

In *Bank of Watertown v. Landon*, 45 N. Y. 410, the associates, after the expiration of their charter, agreed to continue the business, and the business was continued ostensibly by a corporation. The plaintiff became the owner of a note signed in the name of the corporation, and which he believed was made by a corporation *de jure*. The associates were held to full liability. Cf. the dictum in *Miller v. Coal Co.*, 31 W. Va. 836, 840.

Where the assumption of the corporate privilege was naked, the associates have uniformly been held to full liability to the other contracting party. *Forbes v. Whittemore*, 62 Ark. 229; *Pettis v. Atkins*, 60 Ill. 454; *McLennan v. Hopkins*, 2 Kan. App. 260; *Chaffe v. Ludeling*, 27 La. Ann. 607, 611; *Johnson v. Corser*, 34 Minn. 355 (see the explanation of this case in 52 Minn. 239, 244); *Furniture Co. v. Crawford*, 127 Mo. 356, 364; *Haslett v. Wotherspoon*, 2 Rich. Eq. (S. C.) 395; *Owen v. Shepard*, 59 Fed. 746. See also *Johnson v. Okerstrom*, 70 Minn. 303, 311; *Martin v. Fewell*, 79 Mo. 401; *Bergeron v. Hobbs*, 96 Wis. 641. The assumption of the corporate privilege may be called naked wherever the associates have not filed or recorded their certificate of incorporation (or similar paper) in any public office designated by law for the filing of such papers.

Even when the conditions stated in the opening paragraph of the article are satisfied, if the other contracting party did not have knowledge, and cannot reasonably be charged with knowledge, that the associates intended to contract as a corporation, — in other words, where there is no basis for any estoppel against him, the associates are held to full liability. *Christian Co. v. Fruitdale Co.*, 121 Ala. 340; *Duke v. Taylor*, 37 Fla. 64; *Field v. Cooks*, 16 La. Ann. 153; *Martin v. Fewell*, 79 Mo. 401; *Guckert v. Hacke*, 159 Pa. St. 303; *N. Y. Bank v. Crowell*, 177 Pa. St. 313; *Slocum v. Head*, 105 Wis. 431. See also *Lawler v. Murphy*, 58 Conn. 294, 313; *Eaton v. Walker*, 76 Mich. 579, 587; *Mitchell v. Jensen*, 29 Utah 346, 360; *Clausen v. Head*, 110 Wis. 405.

As to the liability of the associates in tort, see the article in 20 HARV. L. REV. 456, and the authorities collected in note 30 to that article.

No associate can be held unless he has participated in, authorized, or ratified the act because of which the plaintiff asks relief. But no rules to determine what is authorization or ratification should be evolved which are contrary to the general principles of agency. The same rules should be applied as in the case of joint-stock companies whose members do not assume to be incorporated. If a body of men unite to engage in a business, and appoint a few of their number to manage it, and these few, or their sub-agents, make contracts within the scope of the business, the contracts so made are authorized by the associates, — it should not be necessary to show that the associates authorized the particular transaction. See *Pettis v. Atkins*, 60 Ill. 454; *Frost v. Walker*, 60 Me. 468; *Tappan v. Bailey*, 4 Met. (Mass.) 529; *Ferris v. Thaw*, 72 Mo. 446; *Booth v. Wonderly*, 36 N. J. L. 250; *Medill v. Collier*, 16 Oh. St. 599, 613; *Ash v. Guie*, 97 Pa. St. 493. Cf. *Stafford Bank v. Palmer*, 47 Conn. 443; *Central Bank v. Walker*, 66 N. Y. 424; *Seacord v. Pendleton*, 55 Hun (N. Y.) 579.

NOTE B.

English Authorities.

It was recognized from a very early date that certain bodies of men were authorized of common right to act as a unit for some purposes. Such bodies were called corporations at the common law. Y. B., 11 Hen. IV, 12; Y. B., 37 Hen. VI, 30; Y. B., 8 Edw. IV, 6; Y. B., 20 Edw. IV, 2; Y. B., 14 Hen. VIII, 2; Co. Lit. 3a; Finch's Law, c. XVII; Keilw., 32a; 2 P. Wms. 125; 4 Vin. Abr. 525. See also Madox, *Firma Burgi*, 85, 91. Cf. Y. B., 19 Hen. VI, 80.

The general rule, however, was that a body of persons were not authorized of common right to act as a unit. Madox, *Firma Burgi*, 26; Bracton, lib. I, c. 24, fol. 56; Y. B., 49 Edw. III, 3; Y. B., 10 Hen. IV, 3; Y. B., 20 Edw. IV, 2; Y. B., 22 Edw. IV, 34; Y. B., 12 Hen. VII, 27; Brooke, *Abr. Corp.*, 81.

The sovereign could, by charter, authorize a body of men to act as a unit. The courts refused to give effect to such authorization when made by any person or body other than the sovereign. Madox, *supra*; Bracton, *supra*; Y. B., 49 Edw. III, 3; Dyer 81, fl. 64; Brooke, *Abr. Corp.* 33. Cf. Y. B., 14 Hen. VIII, 2.

Collateral attack upon legal incorporation was unhesitatingly permitted. Y. B., 49 Edw. III, 3; Y. B., 20 Edw. IV, 2; Y. B., 22 Edw. IV, 34; Y. B., 12 Hen. VII, 27.

For the remarks of Coke as to the nature of a corporation, see *supra*, p. 306.

Adams & Lamberts Case, 4 Coke 104 b, 107 b. By statute 1 Edw. VI, c. 14, "all manner of colleges" were given to the king. The court might well have construed this to include all colleges, incorporated or unincorporated, but "a difference was agreed: that where the college, chantry, &c had such beginnings which might have made a lawful foundation, but for error or imperfection in the penning or proceeding of it, was not in judgment of law lawfully founded. Such college or chantry is given

to the King by the said act; but when there is a college or chauntry only in vulgar reputation, without any commencement or countenance of a lawful foundation, there such college or chauntry is not given to the King by this act."

With the economic development of England, there came to be need of some device by which the capital of many persons could be united. Charters of incorporation were difficult to obtain; large partnerships, therefore, were formed, the articles of partnership being moulded so as to give, as far as possible, the same results as though the members were incorporated. Such a large partnership was usually called a joint-stock company. These companies were not infrequently promoted in a manner calculated to mislead and injure the public. The public might be led to believe that they could free themselves of all liability at any time by transferring their shares, and that their liability, while they continued members of the company, would be limited to the par value of their share. Moreover, many companies were formed to carry out projects not economically justifiable.

These companies aroused such hostility that Parliament passed a statute, commonly known as the Bubble Act, to repress them. Geo. I, c. 18 (1719). This provided, among other things, that "the acting or presuming to act as a corporate body or bodies . . . without legal authority . . . shall . . . forever be deemed to be illegal and void"; and that violations of the act should be deemed to be public nuisances and punishable in the criminal courts as such (§§ 18, 19).

This statute was in force for over a century. The objection that a company was illegal under this statute could, without doubt, be raised collaterally. See *Buck v. Buck*, 1 Campb. 547; *Rex v. Stratton*, 1 Campb. 549, n.; *Pratt v. Hutchinson*, 15 East 510; *Josephs v. Pebrer*, 3 B. & C. 639; *Kinder v. Taylor* (per Eldon, C.), 3 L. J. Rep. (o. s.) 68.

When these provisions were repealed (6 Geo. IV, c. 91, 1825), Lord Eldon secured the introduction of a recital that it was expedient that such matters "should be adjudged and dealt with in like manner as the same might have been adjudged and dealt with according to the Common Law."

In *Duvergier v. Fellows*, 5 Bing. 248, 266 (1828), Best, C. J., said: "Persons who, without the sanction of the legislature, presume to act as a corporation are guilty of a contempt of the King, by usurping on his prerogative." A defendant convicted in a *quo warranto* proceeding may be fined, and "this shows that the usurpation is considered as a criminal act . . . The acting as such a corporation, without charter from the Crown, is contrary to law, and no man can maintain an action on a bond given to secure payment of a compensation to the obligee for the formation of any such pretended corporations." This reasoning necessarily leads to the conclusion that there may always be collateral attack on unauthorized corporate action. See also *Blundell v. Winsor*, 8 Sim. 601.

On the other hand, Tindal, C. J., said: "I am not aware that presuming to act as a corporate body was an offense at common law." *Harrison v. Heathorn*, 6 M. & G. 81, 107 (1843). See also *Queen v. Tankard*, [1894] 1 Q. B. 548, 551.

As to what action is an assumption of the corporate privilege, see *Duvergier v. Fellows*, 5 Bing. 248; *Walburn v. Ingilby*, 1 M. & K. 61, 76; *Garrard v. Hardey*, 5 M. & G. 471; *Harrison v. Heathorn*, 6 M. & G. 81, 137; *Sheppard v. Oxenford*, 1 K. & J. 491, 495.

The Companies Act of 1862 (25 & 26 Vict., c. 89, § 4) provided that "no company, association, or partnership consisting of more than twenty persons shall be formed . . . unless it is registered as a company under this Act." This provision is still in force. The courts have uniformly refused to enforce any contract made with a body which should have been registered under this provision. The authorities are collected in Lindley, *Companies*, 6 ed., 185, note c.

This review of the authorities establishes that there is no authority in England from

the earliest times to the present day denying collateral attack upon incorporation where the assumption of the corporate privilege is naked.

Suppose, however, (1) that a charter of the king has been actually, but improvidently, issued; or (2) that Parliament has passed a special act of incorporation to become effective upon the performance of conditions precedent, and that the conditions have not been performed; or (3) that there has been partial, but not complete, compliance with the provisions of a general incorporation law.

(1) Grant was of opinion that if a charter had been issued by the king as an exercise of the royal prerogative and it was in excess of such prerogative, the associates and their successors were, after acceptance, estopped to dispute the validity of the charter. But the authorities which he cites cannot be said clearly to establish his point. *Grant, Corp.*, 20 (note p), 21 (notes q and r), 22 (notes t and x), 23 (note b).

In *Queen v. Boucher*, 2 G. & D. 737 (1842), a statute authorized the crown, on a given state of facts, to grant a charter of incorporation to a municipality. The crown granted a charter. The court refused, where the validity of the incorporation was questioned collaterally, to inquire whether the charter had been properly granted. This is apparently the first case in which the English courts denied collateral attack. The remarks of Denman, C. J. (p. 749), are inconsistent with his own remarks in *Rutter v. Chapman*, 8 M. & W. 1, 110.

In *Atty.-Gen. v. Avon*, 33 Beav. 67, 74 (modified, on appeal, 9 L. T. (N. S.) 187), a court of equity declined to inquire collaterally whether a municipal charter, actually issued by the crown, was, under the terms of the statute, properly issued.

(2) *Denton v. East Anglian Co.*, 3 C. & K. 16. Parliament passed an act consolidating three corporations into one, the act to take effect when a certain certificate was given. The plaintiff sued the consolidated company to recover the price of goods sold. Counsel for the defendant objected that the plaintiff had not shown that the certificate had been given. A witness testified that business had been done in the name of the consolidated company. *Campbell, C. J.*, directed a verdict for the plaintiff.

(3) The first general incorporation law in England was passed in 1844 (7 & 8 Vict., c. 110). In *Pilbrow v. Pilbrow's Co.*, 5 C. B. 440, 472 (1848), three of the judges apparently were of the opinion that a certificate of registration under the statute was conclusive evidence of the incorporation of the associates. It put the associates "upon the same footing as if they held the patent confirmed by an act of Parliament." In *Banwen Iron Co. v. Barnett*, 8 C. B. 406 (1849), the question was considered with more care. A shareholder resisted a call on the ground that the certificate of registration had been granted upon the production of a deed not containing all the matter required by law. *Maule and Williams, JJ.*, concurred in disallowing this defense. Both judges inclined to hold "that, although the registrar may have erred in granting a certificate of complete incorporation, the company [was] to be considered as an incorporated company, until dissolved by a competent authority." *Maule, J.*, who gave the principal opinion, rested his judgment, however, on a narrower ground. The defendant was to be taken as one of the shareholders who concurred in having the deed registered, and therefore he could not raise any objection to the incorporation. But a stranger's position would differ materially — the certificate might not be conclusive upon everybody.

Williams, J., had remarked that "the Statute appears to be defectively drawn." By 19 & 20 Vict., c. 47, § 13 (1856), it was provided that "the certificate of incorporation given by the registrar shall be conclusive evidence that all the requisitions of this act in respect of registration have been complied with." This provision was repeated in the Companies Act of 1862 (25 & 26 Vict., c. 89).

Nevertheless collateral attack has been allowed where the objection was that the company was not such a company as was authorized to be registered. *In re Northumberland Dist. Banking Co.*, 2 De G. & J. 357; *In re Nat. Debenture Corporation*,

[1891] 2 Ch. 505 (Kekewich, J., said that the certificate was conclusive only "as to matter of machinery"). See also *Liverpool Bank v. Mellor*, 3 H. & N. 551; *In re Bridport Old Brewery Co.*, L. R. 2 Ch. 191, 195; *Wenlock v. River Dee Co.*, 36 Ch. D. 674, 693. Cf. *Peel's Case*, L. R. 2 Ch. 674, 681; *Oakes v. Turquand*, L. R. 2 H. L. 325, 351; *Reuss v. Bos.*, L. R. 5 H. L. 176, 200; *Nassau Phosphate Co.*, 2 Ch. D. 610; *In re Ennis Co.*, L. R. Ir. 3 Ch. D. 94; *Glover v. Giles*, 18 Ch. D. 173; *Hill v. Hill*, 55 L. T. (N. S.) 769; *In re Laxon & Co.*, [1892] 3 Ch. 555; *Ladies Dress Ass'n v. Fulbrook*, [1900] 2 Q. B. 376.

By 63 & 64 Vict., c. 48, § 1 (1900), it is provided that the registrar's certificate "shall be conclusive evidence that all the requisitions of the Companies Acts in respect of registration and of matters precedent and incidental thereto have been complied with, and that the association is a company authorized to be registered and duly registered under the Companies Act."

Questions as to collateral attack upon incorporation usually have arisen in the United States where there has been partial, but not complete, compliance with the provisions of a general incorporation law. Owing to the form of their statutes, the English courts have, in the main, not been troubled by these questions.

Apparently no English judge has ever attempted to define the phrase "*de facto* corporation."

NOTE C.

A subscribes to the stock of a corporation organized under an unconstitutional law. The corporation may maintain an action for payment of the subscription. *Evansville Co. v. Evansville*, 15 Ind. 395, 416; *East Pascagoula Co. v. West*, 13 La. Ann. 545; *Weinman v. Wilkinsburg Co.*, 118 Pa. St. 192. See also *St. Louis Ass'n v. Hennessy*, 11 Mo. App. 555.

A takes insurance from such a corporation and gives his note in payment. The corporation may maintain an action for payment of the note. *Freeland v. Penn. Co.*, 94 Pa. St. 504. *Contra*, *Skinner v. Wilhelm*, 63 Mich. 568.

A borrows money from such a corporation. It may maintain an action for repayment, and may enforce the securities given. *Winget v. Quincy Ass'n*, 128 Ill. 67; *Platte Bank v. Harding*, 1 Neb. 461; *Building Ass'n v. Chamberlain*, 4 S. D. 271. See also *St. Louis v. Shields*, 62 Mo. 247, 252. *Contra*, *Green v. Graves*, 1 Doug. (Mich.) 351; *Owen v. Bank of Sandstone*, 2 *ibid.* 134. But in *Burton v. Schildbach*, 45 Mich. 504, a receiver of the corporation was allowed to proceed in equity to require A to account, although the receiver was not allowed to enforce the securities given.

Such a corporation carries goods for A. It may recover the toll. *Black River Co. v. Holway*, 85 Wis. 344.

The receiver of such a corporation may maintain an action against the state itself to recover the consideration paid for a grant which had failed. *Coxe v. State*, 144 N. Y. 396.

Where the corporation is organized under a law which permits the formation of some corporations, but not of such a corporation as was organized, it may maintain an action for payment of a subscription to its stock. Per *Rapallo, J.*, in *Phoenix Co. v. Badger*, 67 N. Y. 294. *Contra*, *Raccoon River Co. v. Eagle*, 29 Oh. St. 238.

A borrows money from such a corporation. It may maintain an action for repayment, and may enforce the securities given. *Homestead Co. v. Linigan*, 46 La. Ann. 1118. See also *New Orleans Co. v. Louisiana*, 180 U. S. 320, 328. Cf. *Workingmen's Bank v. Converse*, 29 La. Ann. 369.

NOTE D.

Where legal incorporation failed because of a lack of good faith on the part of the associates, but this lack in no wise injured A, the corporation may maintain an action

for breach of A's contract. See *Southern Bank v. Williams*, 25 Ga. 534; *Smith v. Mississippi Co.*, 14 Miss. 179; *United States Co. v. Schlegel*, 143 N. Y. 537; *Palmer v. Lawrence*, 3 Sandf. (N. Y.) 161, 168; *Wallace v. Loomis*, 97 U. S. 146, 154. Note also *Pattison v. Albany Ass'n*, 63 Ga. 373.

Where legal incorporation has ceased because of lapse of time, and A thereafter contracts with the associates as a corporation, the corporation may maintain an action for breach of A's contract. *West Missouri Co. v. Kansas City Co.*, 161 Mo. 595; *Miller v. Coal Co.*, 31 W. Va. 836, 841; *Citizens Bank v. Jones*, 117 Wis. 446. *Contra*, *White v. Campbell*, 5 Humph. (Tenn.) 38 (1844). But if A dealt with the associates as a corporation while their charter was in force, he may show that, at time of suit brought, the charter had expired through lapse of time. *Clark v. American Coal Co.*, 165 Ind. 213.

Where the assumption of the corporate privilege is naked, the propriety of allowing this to be a foundation of rights in the associates may well be doubted. If A contracts with the associates as a corporation, does this without more give them a right to sue A as a corporation? Some courts have been careful not to commit themselves to any larger doctrine than that the contract is sufficient to make a *prima facie* case of incorporation. See *Montgomery R. R. v. Hurst*, 9 Ala. 513; *Gaines v. Bank of Mississippi*, 12 Ark. 769; *Brown v. Mortgage Co.*, 110 Ill. 235, 241; *Williams v. Cheney*, 3 Gray (Mass.) 215, 220; *Topping v. Bickford*, 4 Allen (Mass.) 120, 121; *Williamsburg Co. v. Frothingham*, 122 Mass. 391; *French v. Donohue*, 29 Minn. 111, 113; *Johnston Co. v. Clark*, 30 Minn. 308; *Den v. Van Houten*, 5 Halst. (N. J.) 270; *Ryan v. Martin*, 91 N. C. 464. Some courts have gone further, and have said that where the assumption is naked the associates may not sue as a corporation. See *Schuetzen Bund v. Agitations Verein*, 44 Mich. 313; *Methodist Church v. Pickett*, 19 N. Y. 482. On the other hand, there is a cloud of dicta to the effect that if A contracts with the associates as a corporation, he is estopped to show that they were not authorized to act as a corporation. Such a dictum seems first to have been made in *Dutchess Manufactory v. Davis*, 14 Johns. (N. Y.) 239 (1817), in which the court relied on *Henriques v. Dutch West India Co.*, 2 Ld. Raym. 1532. See the explanation of this latter case by Nelson, J., in *Welland Canal Co. v. Hathaway*, 8 Wend. (N. Y.) 480, 481. While the language of these dicta is unrestrained, and, taken at its face value, covers the case of naked assumption, it is clear that in nearly all of the cases no question as to naked assumption was present to the minds of the judges. Such dicta will be found in *McCullough v. Talladega Co.*, 46 Ala. 376; *Lehman v. Warner*, 61 Ala. 455, 466; *Greenville v. Greenville Co.*, 125 Ala. 625, 642; *Searcy v. Yarnell*, 47 Ark. 269, 281; *Plummer v. Struby-Estabrooke Co.*, 23 Colo. 190, 193; *School District v. Alderson*, 6 Dak. 145, 149; *Booske v. Gulf Ice Co.*, 24 Fla. 550, 559; *Petty v. Brunswick Ry. Co.*, 109 Ga. 666, 674; *Lombard v. Chicago Congregation*, 64 Ill. 477, 487; *John v. Farmers' Bank*, 2 Blackf. (Ind.) 367, 369; *Ensey v. Cleveland Co.*, 10 Ind. 178; *Beaver v. Hartsville University*, 34 Ind. 245; *Jones v. Kokomo Ass'n*, 77 Ind. 340; *Cravens v. Eagle Co.*, 120 Ind. 6; *Depew v. Bank of Limestone*, 1 J. J. Marsh (Ky.) 378, 380; *Blanc v. Germania Bank*, 114 La. 739; *Meadow Dam Co. v. Gray*, 30 Me. 547, 549; *Worcester Institution v. Harding*, 11 Cush. (Mass.) 285; *Stoutimore v. Clark*, 70 Mo. 471, 477; *Mason v. Crowder*, 98 Mo. 352; *Congregational Soc. v. Perry*, 6 N. H. 164; *Nashua Co. v. Moore*, 55 N. H. 48, 53; *Dutchess Mfy. v. Davis*, 14 Johns. (N. Y.) 239; *Williams v. Bank of Michigan*, 7 Wend. (N. Y.) 539, 542; *Commercial Bank v. Pfeiffer*, 108 N. Y. 242, 254; *All Saints Church v. Lovett*, 1 Hall (N. Y.) 191, 198; *Newburg Co. v. Weare*, 27 Oh. St. 343, 354; *Grant v. Clay Co.*, 80 Pa. St. 208, 218; *Myers v. Croft*, 13 Wall. (U. S.) 291, 295; *Casey v. Galli*, 94 U. S. 673, 680; *Close v. Glenwood Cemetery*, 107 U. S. 466, 477; *Andes v. Ely*, 158 U. S. 312, 322; *Wallace v. Hood*, 89 Fed. 11, 20; *Wells Co. v. Avon Mills*, 118 Fed. 190, 194. Of these dicta, those entitled to most weight are in *Williams v. Bank of Michigan*, 7 Wend. (N. Y.) 539, 542, and *Com-*

mercial Bank *v.* Pfeiffer, 108 N. Y. 242. See also Calkins *v.* Bump, 120 Mich. 335, 342; Rafferty *v.* Bank of Jersey City, 33 N. J. L. 368. And there are a few decisions the result of which necessarily involves the proposition that one who has contracted with the associates as a corporation is always estopped to defend on the ground that the associates were not authorized to act as a corporation. Blake *v.* Holley, 14 Ind. 383; Meikel *v.* German Soc., 16 Ind. 181; Hasselman *v.* U. S. Mortgage Co., 97 Ind. 365; Liverpool Co. *v.* Hunt, 11 La. Ann. 623; Franz *v.* Teutonia Ass'n, 24 Md. 259 (but see Boyce *v.* Church, 46 Md. 359); Farmers Co. *v.* Needles, 52 Mo. 17; Nat'l Ins. Co. *v.* Bowman, 60 Mo. 252; Studebaker Co. *v.* Montgomery, 74 Mo. 101.

Where the associates are acting under color of right, it is submitted that they should be permitted to sue, as a corporation, for a tort done to their property. See 20 HARV. L. REV. 469-71, and notes 24 and 25. This question has never received careful consideration by the courts. In Am. Trust Co. *v.* Minnesota Co., 157 Ill. 641, there is a dictum that the associates could not maintain any action, on the ground that there was no law under which such a corporation could have been legally formed.

Where the corporation *de facto* is not a party to the suit, and the only question is whether it might be a conduit of title, it is submitted that, if the associates were acting under color of right, their grantee or vendee should be protected. See 20 HARV. L. REV. 457, and note 2. This question has never received careful consideration by the courts. In Am. Trust Co. *v.* Minnesota Co., 157 Ill. 641 (no law), and Bradley *v.* Reppell, 133 Mo. 545 (expiration of charter), the grantee was not protected. But the language in Smith *v.* Sheeley, 12 Wall. (U. S.) 358, would support the opposite conclusion. See also Sherwood *v.* Alvis, 83 Ala. 115, 118; Brickley *v.* Edwards, 131 Ind. 3, 7; Reynolds *v.* Myers, 51 Vt. 444, 445; County of Leavenworth *v.* Barnes, 94 U. S. 70.

Where the associates are sued as a corporation, the courts are very slow to permit them to set up their lack of authority to act as a corporation. See McDonnell *v.* Alabama Ins. Co., 85 Ala. 401 (no law); Racine Co. *v.* Farmers' Trust Co., 49 Ill. 331, 344 (no law); McCarthy *v.* Lavasche, 89 Ill. 270 (no law); Dows *v.* Naper, 91 Ill. 44 (no law); Shadford *v.* Detroit Ry., 130 Mich. 300 (no law); Gardner *v.* Minneapolis Co., 73 Minn. 517 (no law); Latimer *v.* Bard, 76 Fed. 536 (fraud); Miller *v.* Coal Co., 31 W. Va. 836 (charter expired; tort to employee. Cf. Knights of Pythias *v.* Weller, 93 Va. 605); U. S. Express Co. *v.* Bedbury, 34 Ill. 459 (naked assumption); Johnson *v.* Corser, 34 Minn. 355, 358 (naked assumption); Perine *v.* Grand Lodge, 48 Minn. 82 (naked assumption); Corey & Co. *v.* Morrill, 61 Vt. 598 (naked assumption). See also Dooley *v.* Cheshire Glass Co., 15 Gray (Mass.) 404; Hassinger *v.* Ammon, 160 Pa. St. 245; Casey *v.* Galli, 94 U. S. 673. Cf. Pittsburgh Co. *v.* Beale, 204 Pa. St. 85.

THE CONFUSION IN THE LAW RELATING TO MATERIALMEN'S LIENS ON VESSELS.

ALTHOUGH the administration of the maritime law of the United States might, in many particulars, be bettered by a codification, no branch of that law is in more urgent need of legislative amendment than is the law relating to materialmen's liens. It is the purpose of this article to discuss some features of the confusion which exists at present in that division of the maritime law, and to point out the remedy therefor.

The difficulties and anomalies which have arisen can be traced for the most part to three cases decided by the Supreme Court of the United States.

In the first of these cases, *The General Smith*,¹ the Supreme Court reversed a decree *in rem* for supplies furnished a vessel in her home port. Mr. Justice Story explained the decision by saying that although the maritime law gave a lien for necessities furnished to a foreign ship or to a ship in a port of the state to which she did not belong, the case was governed altogether by the state law when the necessities were furnished in the port or the state to which the ship belonged. Inasmuch as in this case the common law of the state in which the owner lived provided no lien under the circumstances, the materialman's claim was denied. The distinction between "foreign" and "domestic" vessels, as these terms are now understood, arose as a result of this decision.

Five years later, in *The St. Jago de Cuba*,² Mr. Justice Johnson declared (1) that it was not in the power of any one except the master to give implied liens on a vessel; and (2) that when the owner is present "the contract is inferred to be with the owner himself on his ordinary responsibility, without a view to the vessel as the fund from which compensation is to be derived." The doctrine of presumption of credit to the owner was thereby established in the law. Whether this was an original view³ or merely

¹ 4 Wheat. (U. S.) 438 (1819).

² 9 Wheat. (U. S.) 409, 416, 417.

³ In *Wilkins v. Carmichael*, Dougl. 101, Lord Mansfield remarked: "Work done for a ship in England is supposed to be on the personal credit of the employer. In foreign parts the master may hypothecate the ship." Cf. *The Albany*, 4 Dill. (U. S. C. C.) 439, 441.

a deduction made from the decision in *The General Smith*, or whether it was in fact the theory of the court in that historic case, we do not undertake to decide.¹ In any event Judge Story was a member of the bench when the later case was decided and recorded no dissent from the law as expressed by his associate.

Finally in 1857 the same court held, in *People's Ferry Co. v. Beers*,² that a contract for the construction of a vessel is not maritime because neither made nor to be performed on the water, and hence is not within the jurisdiction of the admiralty courts.

It is generally conceded that the division of vessels into foreign and domestic ships in the matter of materialmen's liens was not only artificial, but contrary to the law of maritime Europe.³ Furthermore it was not in accord with the theory of the English law. The English admiralty did not deny the right of the materialman to proceed *in rem*. The court was simply not permitted to entertain or enforce a lien for supplies or repairs furnished within the country.⁴ The reason for Mr. Justice Story's error is largely, if not wholly, a matter of conjecture.⁵ But although the vice in his law has been made abundantly evident by the difficulties which have arisen in carrying it into effect, the doctrine of *The General Smith* has been steadfastly adhered to by the Supreme Court.⁶

¹ Cf. Johnson, J., in *Woodruff v. The Levi Dearborne*, Fed. Cas. No. 17988 (1811).

² 20 How. (U. S.) 393.

³ See Benedict, *The Am. Adm.*, 3 ed., §§ 272, 273. As expressed by Mr. Justice Brown in a recent case, the ruling in *The General Smith* was "a distinct departure from the continental system, which makes no account of the domicile of the vessel, and is a relic of the prohibitions of Westminster Hall against the Court of Admiralty." *The Roanoke*, 189 U. S. 185, 194.

⁴ See Longyear, J., in *The Champion*, Brown Adm. (U. S. D. C.) 520, 531; *The Zodiac*, 1 Hagg. Adm. 320, 325; 2 Parsons, Shipp. & Adm., 322. In *The Underwriter*, 119 Fed. 713, 740, 742, Judge F. C. Lowell characterizes the error of Mr. Justice Story as due to the failure to perceive clearly the "difference between jurisdiction and substantive law."

⁵ See *The Brig Nestor*, 1 Sumn. (U. S. C. C.) 73, 74, 79, decided by Judge Story in 1831; and compare Mr. Justice Johnson's insinuation in *Ramsey v. Allegre*, 12 Wheat. (U. S.) 611, 614, 636.

⁶ *The Roanoke*, 189 U. S. 185. With one notable dissent by Mr. Justice Clifford in *The Lottawanna*, 21 Wall. (U. S.) 558, 583, Field, J., concurring. In 1858, by amendment of the 12th Admiralty Rule, the right of the materialman to proceed *in rem* in the case of domestic vessels was taken away, and Chief Justice Taney explained the alteration as due to the fact that the previous practice authorizing such procedure was found to be inapplicable to our mixed form of government, saying in *The St. Lawrence*, 1 Black (U. S.) 522, 530-1: "If the process *in rem* is used wherever the local law gives the lien, it will subject the admiralty court to the necessity of examin-

The decision in *Ferry Co. v. Beers* was quite as much in conflict with the best practice of continental Europe as was the opinion in *The General Smith*,¹ and it has been criticized accordingly. Nevertheless the Supreme Court has just refused to modify its first ruling.²

While less fault has been found with the expressions in *The St. Jago de Cuba*, they are equally objectionable, and it is evident, from a study of the lien law of the country in its present state, that the effect of the case has been no less fatal than that of *The General Smith*. Neither of Mr. Justice Johnson's statements — that when the owner is present the contract is assumed to be made on his individual responsibility, and that only the master can impress the vessel with an implied lien — seems to be duplicated under the continental system, at least in the law of France. The older continental codes are far from explicit on the subject of materialmen's liens. Indeed we sometimes wonder whether modern jurists have exactly interpreted the old sea laws in this particular.³ Generally speaking, such articles as are contained in them deal with "express" rather than with what we now term "implied" liens.⁴

ing and expounding the varying lien laws of every state, and of carrying them into execution." This is precisely what has happened, and it is not difficult to agree with the learned judge that such duties "are entirely alien to the purposes for which the admiralty power was created." Furthermore, it has not always been easy to determine in just what instances the local laws are applicable, — in other words to decide when the vessel must be said to be "domestic" and when "foreign." And this is an important consideration, for if the materialman proceed upon the wrong theory in the first instance he may be precluded after an adjudication from taking the proper steps. See *The New Brunswick*, 125 Fed. 567. The wonder is that the Supreme Court, instead of attempting to dodge the issue, did not overrule *The General Smith* at the first opportunity. The *St. Lawrence* was before the court in 1861, and in 1874, after the 12th Rule had been restored to its original compass, a splendid chance was lost with the decision in *The Lottawanna*.

¹ *Consolato del Mare*, c. 32; 2 Boucher's translation, 38 (1808); Cleirac, *Us et Coutumes de la Mer*, 1661 ed., 419; *Ordonnance de la Marine*, Liv. 1, t. XIV, Art. XVII; 1 Valin, *Com.*, 113, 367; 2 Émérigon, *Traité des Assurances et des Contrats a la Grosse*, Boulay-Paty ed., c. XII, § 111; *Code de Commerce*, Art. 191; 1 Boulay-Paty, *de Droit Com. Mar.*, 121-2; Goirand, *French Commercial Law*, 2 ed. (1898), 250, 594; Benedict, *Adm.*, § 264.

² *The Winnebago*, 205 U. S. 354 (April 8, 1907).

³ Thus, while it is stated by Mr. Justice Curtis in *The Young Mechanic*, 2 Curt. (U. S. C. C.) 404, 408, that "privileged hypothecations were tacitly conferred" under the general maritime law of Europe "in cases in which what we term liens now exist" the learned judge admits that "we do not find their precise nature described in any of the ancient collections of sea laws."

⁴ But note *The Consolato*, c. 34, 2 Boucher, 40. And see Cleirac, 1661 ed., 401, 419; Benedict, *Adm.*, 144.

The Marine Ordinance of Louis XIV, however, which has been regarded as largely a codification of the law then existing, and especially the modern French code, enumerate specifically the nature and rank of privileged claims, including the claims of materialmen.¹ Under those provisions both the *place* where the contract is made and the position of the *person* ordering the necessities appear to be immaterial, provided such person has the requisite authority.² No presumption of individual credit arises with the owner's presence. Moreover, an agreement by a prospective owner for the construction of a ship gives rise to a privileged claim on the *res* without further stipulation, and his order³ or authorization seems to be essential to create a lien for supplies and repairs to the completed vessel at his place of residence.⁴ From the earliest times the continental law has placed restrictions on the authority of the master when at the place where the owner lives.⁵ And under the Code de Commerce the master, when at the place of residence of the owners *or their agents*, cannot furnish his vessel without "special" authorization.⁶ In a sense, therefore, the presence of the owner under the French law does affect the existence of a lien for necessities, but not as it does in this country. Instead of being the person who alone can impress the ship with an implied lien, the French master, generally speaking, can do so of his own right only when away from the owners. When the owner has absented himself without delegating his powers to any one, the master is assumed to be authorized to provide what he deems necessary for the vessel.⁶ And we are told by M. Boulay-Paty that the debt is privileged when the master has supplied the ship at the owner's home without special authority, if he was charged with the duty of equipping and repairing the vessel.⁷ If there are

¹ See Ordonnance de la Marine (1681), Liv. 1, t. XIV, Arts. XVI, XVII; 1 Valin, 362, 367; Code de Commerce, Art. 191; 1 Boulay-Paty, 110, 121; 1 Cresp., de Droit Mar., 104 *et seq.*; Goirand, 250, 593-4; 3 Kent, Comm., 14 ed., *169, n. a.

² See the case "Havre," 19 Rev. Internat. du Droit Mar. 61 (1903).

³ In the construction of a vessel it has been said that if the owner enter into an engagement with an independent contractor to build the ship for a lump sum, the workmen of the latter have no personal claim against the owner, but against the *res* only. The contractor alone has a double claim against both ship and owner. 2 Pardessus, Cours de Droit Com., 6 ed., de Roziere, § 943; and see § 954.

⁴ Consolato del Mare, c. 239; 2 Boucher, 388; Laws of the Hanse Towns, Arts III and IV; Cleirac, 197; Ordonnance de la Marine, Liv. ii, t. I, Art. XVII; 1 Valin, 439; 2 Émérigon, 450 *et seq.*; 2 Pouget, de Droit Mar., 237 and 251.

⁵ Art. 232; 2 Boulay-Paty, 51-2; Goirand, 263, 602.

⁶ 2 Pardessus, § 630.

⁷ 1 Droit Com. Mar., 122.

cases where the materialman is assumed to have credited the owner because he dealt with the latter personally, the materialman seems, nevertheless, to be entitled to a lien by showing that he trusted the ship and by substantiating his claim in the manner provided by law.¹

But whether in accord with the law of maritime Europe or not, the theory that the presence of the owner militates against the existence of a lien for necessities is firmly imbedded in our law. We believe, furthermore, that it furnishes the governing reason why local statutes are deemed necessary in the case of supplies or repairs furnished in the home state, now that Judge Story's exposition of the law has been discredited. Whether it is the opinion of the courts that no lien attaches to a domestic vessel because it is assumed that the owner alone is credited, or because only the master has power to impress the ship with implied liens and this power is assumed to end when the owner is at hand, is, perhaps, not quite clear, but the latter proposition would seem to be better founded. It must be remembered, however, that the presumption in the case of domestic vessels is conclusive.²

Mr. Justice Clifford attempted to correct Johnson's law as well as Story's and was partially successful. Speaking of the master's powers in the matter of necessities, he said: ³

"It is no objection to his authority that he acted on the occasion under the express instructions of the owner, nor will the lien of those who made the repairs and furnished the supplies be defeated by the fact that his authority emanated from the owner instead of being implied by law.

"When the owner is present the implied authority of the master for that purpose ceases, but if the owner gives directions to that effect the master may still order necessary repairs and supplies, and if the ship is at the time in a foreign port, or in the port of a state other than that of the state to which she belongs, those who make the advances will have a maritime lien, if they were made on the credit of the vessel."

This brings us nearer to the continental theory. If we may assume further that the debt is privileged if the owner *tacitly* consents to contracts made by the master in his presence, an important question has been settled.⁴ As is true of so many features of the law

¹ See "Albatros et Cormoran," 18 Rev. Internat. Droit Mar. 37 (1902). Cf. 1 de Valroger, Droit Mar., 120, § 39.

² *Stephenson v. The Francis*, 21 Fed. 715.

³ *The Kalorama*, 10 Wall. (U. S.) 204, 213.

⁴ "His mere presence would not perhaps avoid the lien, but if he buy the supplies

in this country, it cannot be said that the question is free from doubt, and difficult situations are presented, when, as is not infrequent, the master is also a part-owner,¹ and when the owner assumes the duties of master.² Furthermore, is the owner ever "present" in the person of an *agent*, and if so in the person of what agents?³

In *The Kalorama*⁴ the lien was allowed for necessities ordered in a foreign port by the owner *in person* because of "an express understanding" that they were furnished on the credit of the steamer.

"Implied liens, it is said, can be created only by the master, but if it is meant by that proposition that the owner, or owners, if more than one, cannot order repairs and supplies on the credit of the vessel, the court cannot assent to the proposition, as the practice is constantly otherwise. . . .

"More stringent rules apply as between one part-owner and another, but the case is free from all difficulty if all the owners are present and the advances are made at their request, or by their directions, and under an agreement, express or implied, that the same are made on the credit of the vessel."⁵

This ruling was followed by a number of district judges, and the doctrine of the case afterwards restated by the Supreme Court in *The Valencia*.⁶ Mr. Justice Harlan there remarks that "in the absence of an agreement, express or implied, for a lien, a contract for supplies made directly with the owner in person is to be taken as made on his ordinary responsibility without a view to the vessel as the fund from which compensation is to be derived."⁷ So far as the owner is permitted to contract upon the credit of the ship the lien thus recognized appears to agree with the French law.⁸ It is to be noted, however, that the latest expression of the Supreme Court resorts to the reasoning in *The St.*

and be of credit and have the opportunity to give his own security by making contract liens or otherwise, there is no *implied* lien." *The Rapid Transit*, 11 Fed. 322, 329.

¹ *The Saratoga*, 100 Fed. 480. *Cf. Thomas v. Osborn*, 19 How. (U. S.) 22; *Reed v. Pratt*, *ibid.* 359.

² *The Havana*, 54 Fed. 201, 203, *aff'd* 64 Fed. 496.

³ *The Jeanie Landles*, 17 Fed. 91, 92; *The New Brunswick*, 129 Fed. 893-5.

⁴ 10 Wall. (U. S.) 204.

⁵ Pp. 214, 215.

⁶ 165 U. S. 264 (1896).

⁷ Pp. 270, 271.

⁸ Judge Putnam seems to regard the doctrine as novel and peculiarly American. *Cuddy v. Clement*, 113 Fed. 454, 461-2. *Cf. I de Valroger*, 120.

Jago de Cuba, and while it may be admitted that it is advantageous to permit an owner to lien his vessel without a formal contract and that the step taken is in the right direction, it cannot be said that the method provided has made easier the task of either court or counsel. Are the *agents* of the owner to be assumed to have authority to bind the ship by the "express or implied" agreement which the law requires? This inquiry is of the greatest importance, when the necessities are, in fact, ordered by an agent, which is frequently the case. Upon this subject the American law is, as yet, undeveloped. Most of the cases in which the question appears were decided before *The Valencia*, and in others the point seems to be ignored by the court.¹

Some uncertainty also exists as to the precise nature of the "new" lien. One view is that since the presumption against a lien for supplies ordered by the owner in a foreign port is not conclusive, the agreement serves not to create a lien *de novo*, but only to rebut the presumption that the owner alone is credited; and that "a contract in fact for a lien" is not necessary, all that the law requires being a "common understanding" between owner and materialman "equivalent to a common intent to bind the ship."² Another view seems to be that the claim on the *res* arises by virtue of a waiver on the part of the owner of a limitation which exists solely for his benefit.³ It is apparent, however, that without some evidence of acquiescence on the part of the owner the lien does not attach — whether it is held to be created by the agreement or to arise by implication of law.⁴ And the determination of the question as to just what evidence is necessary to establish the required common understanding between the parties, has been most difficult, especially when the owner is a person of questionable financial responsibility.

The insolvency of the owner is undoubtedly of great importance,⁵ at least if the state of the owner's finances were known to

¹ Compare *The Mary Morgan*, 28 Fed. 196, and *The Westover*, 76 Fed. 381, with *The Patapasco*, 13 Wall. (U. S.) 329, and *The Philadelphia*, 75 Fed. 684, 687 (*Lampers' Case*). And see *The Ludgate Hill*, 21 Fed. 431; *The Suliote*, 23 Fed. 919, 926.

² *The Ella*, 84 Fed. 471. But *cf.* *The Mary Morgan*, 28 Fed. 196; *The Westover*, 76 Fed. 381.

³ *The Underwriter*, 119 Fed. 713, 757.

⁴ See *The Iris*, 100 Fed. 104, 110 (C. C. A., First Circ.); *The George Farwell*, 103 Fed. 882, 883-4 (Second Circ.); *The Havana*, 92 Fed. 1007 (Third Circ.); *Alaska Co. v. Chamberlain & Co.*, 116 Fed. 600, 602-3 (Ninth Circ.).

⁵ *The Newport*, 107 Fed. 744, 748.

the materialman when he sold the necessities in question, and if considered in connection with the other circumstances of the case. But there is danger that the effect of insolvency will be allowed to crystallize into a presumption,¹ and a superabundance of presumptions is already one of the most conspicuous evils in the law as administered in this country.² Why should the fact of the owner's insolvency be more conclusive of credit to the vessel than a charge or entry made in the books of the materialman, which is admittedly not controlling?³ Indeed, the admission of inferences to establish the required agreement has led to expressions of doubt concerning the wisdom of the doctrine of *The Kalorama*.⁴ Finally it may be pointed out that if an agreement for a lien is absolutely necessary when the owner orders in person, the circumstance that the materialman may honestly suppose he is dealing with the *master* is immaterial.

We have been speaking of contracts by the owner in a foreign port. The state of the law is equally distressing in the case of supplies ordered in the home port.

In a case reported in *Flippin*,⁵ Judge Hammond held that as the Tennessee statute did not say credit to the vessel was necessary it would be an "interpolation" to add the condition, and he accordingly allowed the liens claimed, notwithstanding his finding that the proof did not rebut the presumption of credit to the owner. In *The Samuel Marshall*⁶ this question was carefully considered by the Circuit Court of Appeals for the Sixth Circuit, and the conclusions in the earlier case expressly disapproved. The court

¹ Cf. Hughes, *Handbook of Admiralty Law*, 93; *The Advance*, 72 Fed. 793, 798.

² The facts in *The Patapsco*, 13 Wall. (U. S.) 329 (1871), well illustrate the vicious manner in which this question of the owner's insolvency may arise. The case has been regarded as exceptional. *The Valencia*, 165 U. S. 264, 269, 270; *Stephenson v. The Francis*, 21 Fed. 715, 722. It is at least an unfortunate precedent. And as an example of the conflicting impressions which the decision has made it may be said that in *The Iris*, 100 Fed. 104, 107, Judge Putnam treats the case as one where supplies were ordered by the *master*, while in *Cuddy v. Clement*, 113 Fed. 454, 460, he speaks of the supplies as "ordered by the owner" without a contract. Compare further *The Ludgate Hill*, 21 Fed. 431, *Stephenson v. The Francis*, *ibid.* 715, 722, and *The Havana*, 54 Fed. 201, 203, with *The Allianca*, 63 Fed. 726, 732, and *The Advance*, 72 Fed. 793, 798. In *The Alvira*, 63 Fed. 144, 154, Judge Morrow refers to *The Patapsco* as a decision on the question relating to the burden of proof.

³ Hughes, *Adm.*, 93. And see *The Grand Republic*, 138 Fed. 615, where the charge was made to the owner.

⁴ *The Havana*, 87 Fed. 487.

⁵ *The Illinois*, White & Cheek, 2 Flip. (U. S. D. C.) 383.

⁶ 54 Fed. 396 (1893).

declared that it could not be presumed that the state legislatures intended to avoid the limitations of the maritime law except "as to the foreign character of the vessel," that the obvious purpose of the local laws was to put residents of the home port on an equality with citizens of a foreign state, and therefore the lien created should be assumed to have all the other "peculiar characteristics" of a maritime lien. In this case the necessities were ordered by the *master* in the port of the charterer, and inasmuch as there was a condition in the charter-party that the charterer should pay for them, of which the materialman had knowledge, the decision on the necessity of credit to the vessel has been treated by some courts as a dictum.¹ The ruling, however, was followed by the Circuit Court of Appeals for the Ninth Circuit in a case where there was no charter limitation,² and was cited with approval by Judge Addison Brown in *The Advance*,³ and by the Circuit Court of Appeals for the Second Circuit in *The Electron*.⁴ Nothing is said in any of these cases about the necessity of an "agreement" for a lien,⁵ although both *The Samuel Marshall* and *The Electron* have been referred to as deciding that evidence of a common understanding is necessary.⁶ But in *The Westover* Judge Seaman sustained exceptions to a libel for necessities furnished in the home port upon the order of the owner's agent, for the avowed reason that the evidence did not show that the credit of the vessel was contemplated by the parties in their contract.⁷ On the other hand, in *The Alvira*, Judge Morrow, though recognizing that the object of state laws was "to place domestic liens on an equal footing with foreign liens," declared that this purpose did not render them "in all respects the same," and that the rule of presumption of credit to the owner was not applicable to domestic liens, else

¹ See *The Iris*, 100 Fed. 104, 112; *The Vigilant*, 151 Fed. 747, 751.

² *Lighters*, Nos. 27 & 28, 57 Fed. 664, 666.

³ 60 Fed. 766, 767.

⁴ 74 Fed. 689, 694; the owner was here the orderer.

⁵ *Cf.* also *The Sappho*, 89 Fed. 366, 373-4.

⁶ *Hughes*, Adm., § 50; *Ames*, Cas. on Adm., 110, n. And see *The Wm. P. Donnelly*, 156 Fed. 302.

⁷ "As the maritime law imposes the presumption that credit is given to the owner personally when present at a foreign port and always at the home port, and as the statute operates to create a lien which is enforceable only according to the rules of admiralty, the effect is to make that presumption rebuttable, and thus place the domestic lien upon an equal footing with foreign liens, if the credit is so given in fact. This lien is not implied, but must rest upon a mutual contract which contemplates a credit upon the *res*." 76 Fed. 381 (Dist. Ct., E. D. Wis.).

the very object of the local law—the lien itself—would be defeated.¹ The learned judge found as a fact, however, that the necessities in question were supplied on the credit of the ship, not because of a mutual understanding, but referring to the law established by *The Patapsco*.² Then came the decision in *The Iris*,³ in which Judge Putnam for the Circuit Court of Appeals for the First Circuit held that under the Massachusetts law there was no necessity “of either alleging or proving that credit was given the vessel by a mutual agreement.”⁴ The court further asserted “the unrestricted power of state legislatures to create liens on domestic vessels under such limitations as each may determine,” saying: “The case in admiralty becomes complete if only the conditions of the statute which assumes to give the liens are complied with, and whether or not those conditions conform in all details to the general rules of the maritime law.”⁵ In consequence the case is cited as standing for the proposition that statutes silent upon the subject “create a conclusive presumption of credit to the vessel.”⁶

The Iris is quoted with approval in a very recent case in the Circuit Court of Appeals for the Third Circuit,⁷ which disagrees with the view taken in *The Samuel Marshall*. On the other hand, in an equally recent decision in the Second Circuit the circumstance that the case holds an opinion apparently contrary to that in *The Electron* is stated as affording the court “no reason for modifying our former opinion.”⁸ In *The Vigilant*, the first of these recent cases, the supplies were ordered by the owner, and the court says that any limitations on a statutory lien “must be sought in the statute itself”; holding that under the law of Pennsylvania “no express pledging of the credit of the vessel is required to create the lien.”⁹

We thus find a variety of opinions upon the subject under consideration, the Circuit Courts of Appeal for the Second and Ninth Circuits, at least, deciding that some evidence of credit to the vessel is necessary, Judge Seaman and perhaps the judges of the Second and some other circuits requiring a common understanding, and the Circuit Court of Appeals for the First Circuit taking the

¹ 63 Fed. 144, 149-50.

² 100 Fed. 104, aff'd on rehearing 101 Fed. 1006.

³ Pp. 110-12.

⁴ *The City of Camden*, 147 Fed. 847, 849.

⁵ *The Vigilant*, 151 Fed. 747 (Jan. 30, 1907).

⁶ *The Golden Rod*, 151 Fed. 8 (Jan. 30, 1907).

⁷ 13 Wall. (U. S.) 329.

⁸ Pp. 112-13.

⁹ 151 Fed. 750, 753.

position not only that no such understanding is necessary, but that in the absence of a statutory requirement the question of credit is immaterial. This was also Judge Hammond's position.

With the view that a mutual agreement is not necessary the Circuit Court of Appeals for the Third Circuit now agrees, differing with Judge Putnam on the matter of the materiality of credit by construing a state statute which says nothing with reference thereto as in effect saying that the necessities ordered "are presumed to be on the credit of the vessel unless the contrary is shown," and placing upon one undertaking to defeat the lien a burden which the court intimates can only be sustained by showing an "express repudiation" on the part of the materialman, or "an understanding between the parties that no such lien is contemplated."¹ A somewhat parallel conception of the law seems to have been in the mind of Judge Morrow, though he prescribes no particular form of evidence as necessary to prevent the lien from attaching, except that it must be shown affirmatively that credit was not given the vessel.² It seems to us that there is much in the view as thus expressed, and if we correctly interpret Émérigon, the same theory prevailed under the continental system.³

A petition to the Supreme Court for a writ of certiorari was filed in *The Iris*, and in the supporting brief it was strenuously argued that proof of credit to the vessel was essential to the establishment of a lien under a state statute — "proof enough to overcome the presumption against such credit." The denial of the petition⁴ would seem to indicate that the Supreme Court agrees that the necessity of crediting the vessel depends upon the wording of the local statute. If this is the meaning of the refusal, it is in utter disregard of earlier expressions of distinguished members of the same tribunal.⁵ It may be said, however, that the district judge found as a fact that the supplies were furnished on the credit of the vessel.⁶ And Mr. Justice Brown has since found fault with the law of the State of Washington because it

¹ *The Vigilant*, 151 Fed. 753. But see *The Rockaway*, 156 Fed. 692, 696.

² *The Alvira*, 63 Fed. 154.

³ Thus he says, speaking of a claim for the construction of a vessel, the debt is privileged unless it is shown the materialman "trusted the person and not the thing."

⁴ Émérigon, Boulay-Paty ed., c. XII, § 111; Benedict, Adm., 144.

⁵ *Woodworth v. Nute*, 179 U. S. 682.

⁶ See Bradley, J., in *The Lottawanna*, 21 Wall. (U. S.) 558, 581; Gray, J., in *The J. E. Rumbell*, 148 U. S. 1, 19.

⁷ 88 Fed. 902, 909.

gave, or at least created, the presumption of a lien "though the materials be furnished upon the order of the owner in person."¹ But whatever the view of the Supreme Court may be, the opinion in *The Golden Rod*² indicates that the question is still in dispute among the inferior federal courts.³

Perhaps a distinction may be made between necessities ordered by the master in the home state, and those ordered by the owner.⁴ But while credit to the vessel would seem to be essential on principle under our present system, as well in the case of liens claimed under state statutes as under the so-called general law, it does not seem a necessary conclusion that such a "peculiar characteristic" of the general law as the doctrine of presumption of credit to the owner must be applied regardless of the local law. Unless the state statutes are construed as effecting a change in this particular, they leave the materialman practically no better off than he was before. There was nothing on principle to prevent the owner from contracting to give the security of the vessel in the absence of local legislation.⁵ Judge Story did not say that no lien could "exist" unless conferred by the municipal law, but that none was "implied."⁶ Neither *The General Smith* nor *The St. Jago de Cuba* dealt with "express" liens. And while the lien recognized in *The Kalorama* may be said to arise, as Judge Bradford concluded,⁷ by implication of law, in fact it owes its existence to the agreement of the parties.

It is very apparent that the law suffers for want of consistency. Starting falsely, it has become a patchwork of conflicting ideas.

In the much-quoted language of Mr. Justice Johnson, the object of the recognition of an implied hypothecation of the vessel in a distant port was "to furnish wings and legs to the forfeited hull to get back for the benefit of all concerned."⁸ The security

¹ *The Roanoke*, 189 U. S. 196.

² 151 Fed. 8.

³ Cf. *The William P. Donnelly*, 156 Fed. 302, 305.

⁴ Note the language of Putnam, J., in stating the second question in *The Iris*, 100 Fed. 104, 108.

⁵ See *The Mary Morgan*, 28 Fed. 196, 200; *The Union Express*, Brown Adm. (U. S. D. C.) 537; *The Hull of a New Ship*, Davies (U. S. D. C.) 199, 202-4. Cf. Lowell, J., in *The Underwriter*, 119 Fed. 713, 756.

⁶ Cf. *The Schooner Marion*, 1 Story (U. S. C. C.) 68.

⁷ *The Ella*, 84 Fed. 471.

⁸ *The St. Jago de Cuba*, 9 Wheat. (U. S.) 416. "Maritime liens for repairs and supplies," says Putnam, J., in *Cuddy v. Clement*, 113 Fed. 454, 458, "are in the nature of safeguards against the emergencies in which seagoing vessels may be placed at

of the materialman was thus of secondary importance, and the primary object of the law was to insure the use of the vessel as an instrument of commerce. Unless the vessel was credited no lien arose, but a special agreement to that effect was not required in the case of the master.¹

The local statutes were enacted to supply a supposed defect in the maritime law and in order, it is said, that foreign and domestic vessels might be on the same footing with respect to materialmen's liens. But the history of local legislation in the United States shows that the real object of the legislators has been the protection of resident laborers and supply men. And whether or not it is essential that credit be given domestic vessels, is still uncertain.

The presence of the owner is said to interfere with the establishment of an implied lien for necessities. When he looks for the reason the practitioner discovers that he has a choice between two theories. Perhaps only the master can create implied liens. Perhaps the vessel is domestic in every state where an owner happens to live.

In *The Valencia* the question "under what circumstances, if under any, a charterer who has control and possession of a vessel under a charter party requiring him at his own cost to provide for necessary supplies and repairs may pledge the credit of the vessel" was expressly reserved.² A lien created by the engagement of one having no authority in the premises, express or implied, would seem to possess some novelty,³ certainly if the materialman were cognizant of the facts. In *The Kate*, it is true, Judge Harlan said that if the libellant had furnished the necessities upon the order of the *master* "a different question" would be presented, but he added significantly, furnished "without knowledge or notice that the vessel was operated under a charter."⁴ Nevertheless, in a recent decision by the Circuit Court of Appeals for the First Circuit,⁵ supplies furnished a chartered vessel in a foreign port on the order of the steward were treated as contracted for by the master and a lien allowed, though it was claimed that

foreign ports." The court accordingly denied the claims made, since the owner had made a written contract for the season. And the same rule has been applied in the case of an oral contract. See *The New Brunswick*, 129 Fed. 893, 894.

¹ *The Eliza Jane*, 1 Spr. (U. S. D. C.) 152, 153; *The Emily Souder*, 17 Wall. (U. S.) 666, 671.

² 165 U. S. 264, 272. Cf. *The Kate*, 164 U. S. 458, 471.

³ *The Vigilant*, 151 Fed. 751; *The Suliste*, 23 Fed. 919, 926.

⁴ 164 U. S. 470.

⁵ *The Surprise*, 129 Fed. 873.

the libellants were expressly informed or put on notice of the condition in the charter-party. The opinion lays great emphasis upon the character of the necessities furnished the vessel, and *The Kate* and *The Valencia* are distinguished as of narrow application. In the District Court Judge Lowell dismissed the libels because of his belief that the materialmen were chargeable with knowledge of the charterer's obligation.¹ And the same learned judge denied the lien in another and similar case, since the supplies were not furnished in a "port of distress," concluding, apparently, that the contract between the parties acted as a restriction upon the master's authority under ordinary circumstances.² The question may well be considered an open one.

Assuming that one dealing with a vessel of his own initiative — a trespasser or a volunteer — could not claim the security of the *res*,³ is the contract alone of importance in determining the question of the existence of a lien under our law? In other words, does the lien attach by virtue of the contract or because of the acquisition by the *res* of something of value? It seems to be unquestioned that the necessities must at least be "appropriated" to the use of a particular vessel,⁴ but beyond this the authorities are in disagreement. Mr. Justice Nelson reversed a decree *in rem* for damages arising from the master's refusal to accept necessities ordered by him, on the ground that the lien attaches only in cases "where the materialman or ship chandler has parted with the materials and stores and the ship has received the benefit of them."⁵ On the other hand, for the alleged reason that "in admiralty the vessel is regarded as the contracting party," Judge Hughes concluded that delivery to or for the ship was not essential.⁶ These two cases represent the extreme views.

In *The James H. Prentice*,⁷ after a careful examination of the law as to the meaning of the term "furnished" as used in the Michigan

¹ Decision not reported.

² *The Underwriter*, 119 Fed. 762-4.

³ *Cf.* Lowell, J., in *The Underwriter*, 119 Fed. 759.

⁴ *Sewall v. The Hull of a New Ship*, 1 Ware (U. S. D. C.) 565.

⁵ *The Cabarga*, 3 Blatchf. (U. S. C. C.) 75 (1853). Followed in *The Daniel Kaine*, 31 Fed. 746, 748.

⁶ *Aitcheson v. The Endless Chain Dredge*, 40 Fed. 253, 254. "The vessel being the contractor, when she orders machinery, materials, and repairs, she puts it out of her power to refuse to accept, or by a subsequent sale to obstruct the delivery of, the things contracted for. It is her contract for the materials which binds her, without any reference to the delivery or non-delivery of the articles bargained for."

⁷ 36 Fed. 777. Opinion by Mr. Justice Brown.

statute, and of the conflicting decisions, it was held as the sounder doctrine that it was not incumbent upon the materialman to show that the necessities were actually used by or incorporated in the vessel,¹ although it seems to have been agreed that the term is of such import that no lien can arise from the breach of an executory contract. And in *The Vigilancia*² it was declared that there could be no delivery in the maritime sense, "so as to bind the ship *in rem*," until the goods were either actually put on board the ship or else brought within the immediate presence or control of her officers.

There is, therefore, some uncertainty as to the theory which prevails in the United States courts with respect to the act or acts which give rise to a lien for necessities and the time when the lien attaches. We do not assume that any distinction exists between supplies and repairs in this particular, and it may be that the statement of the learned judge in *The Endless Chain Dredge*,³ that the contract raises the lien, went too far. But whether the lien is held to exist by reason of the contract alone, or whether the materialman must in addition put the ship at least in a position to receive the benefits which the necessities will confer, before the lien can attach, the element of delivery does appear to be of importance, under our peculiar system, on the question of the kind of lien to be claimed. In *The Vigilancia* the necessities were shipped from a foreign port and delivered to the vessel in her home port. The materialman had not complied with the requirements necessary to the establishment of a "statutory" lien, and it was held that he had no lien under the general law, because "the place where the ship is at the time the supplies reach her is the test in all such cases."⁴ Indeed, Judge Hughes once held that the fact that the necessities were ordered in the home port did not prevent a lien under the general law when they were put on board in a foreign port.⁵ The

¹ Accord, *The Winnebago*, 141 Fed. 950 (C. C. A. 1905).

² 58 Fed. 698, 700, A. Brown, J.

³ 40 Fed. 253.

⁴ Cf. *The Cimbria*, 156 Fed. 378, 382-3.

⁵ *The Agnes Barton*, 26 Fed. 542, 543. "The lien attached while the vessel was in a foreign port. It attached as upon a foreign vessel. Its character was determined by the delivery of the sails at that port and could not be changed by the accident that the sails were made at the home port under a contract also made there." Citing *The Sarah J. Weed*, 2 Low. (U. S. D. C.) 555, 561, where Judge John Lowell states that "supplies furnished in a foreign port, though by a citizen of the state to which the vessel belongs, are foreign supplies," and "supplies furnished in the home port by a foreigner will be domestic supplies."

court ignored the circumstance that the supplies were ordered by the owner in person without an agreement for a lien, and for this reason the decision has been criticized.¹ And it seems justly criticized, although Judge Brown has attempted to distinguish this class of cases as permitting the inference "of a common intent to deal upon the credit of the ship."²

The question we have been discussing appears again in the construction of local enactments. Since the decision of the Supreme Court in *The Roanoke*³ it must be understood that the states cannot *create* liens on foreign vessels. And a vessel is said to be "foreign" when she is without the state, perhaps states,⁴ to which she belongs. What then are the limits of local authority? The ship must be within the home state when the necessities are "furnished"; must she also be at home when the contract is made, and must the contract be made within the state?

The local statutes vary greatly. In some, as in the Maine statute,⁵ no reference is made either to the place where the contract is made or to the place where the necessities are furnished.⁶ In other states, like Massachusetts,⁷ the local laws as worded give a lien for such necessities only as are furnished or supplied within the state.⁸ The statute of New Jersey⁹ professes to confer a lien in case of a debt "contracted" within the state for work or materials "furnished" in the state. And by the New York Statute also the debt must be contracted within the state.¹⁰

Notwithstanding the language of the local law, however, the Supreme Court of New Jersey has held that it does not matter where the contract is made if the articles are furnished within the jurisdic-

¹ Judge Butler in *The Chelmsford*, 34 Fed. 399, 402. Cf. *The Marion S. Harriss*, 81 Fed. 964; s. c. 85 Fed. 798.

² *The Allianca*, 63 Fed. 726, 732. Cf. *The Vigilant*, 151 Fed. 747, 754.

³ 189 U. S. 185.

⁴ *The Rapid Transit*, 11 Fed. 322, 329-30; *Stephenson v. The Francis*, 21 Fed. 717, 718.

⁵ Me. Rev. Stats. 1903, c. 93, § 7.

⁶ Compare also: Conn. Gen'l Stats., 1902, § 4160; Fla. Gen'l Stats., 1906, §§ 2200, 2204; 2 Starr & Curtis, Ill. Stats., 1896, 2580; 2 Md. Pub. Gen'l Laws, 1904, 1513; 3 Mich. Comp. Laws, 1897, c. 298, 3254; 3 Mo. Ann. Stats., 1906, c. 82, 2680; Ore, 2 Belling & Cotton, Codes, 1816; 2 Sayles, Tex. Civ. Stats., 1897, 1218; 2 Va. Code, 1904, § 2963; 2 Wis. Stats., 1898, c. 144, 2274.

⁷ Mass. Rev. Laws, 1902, c. 198, § 14.

⁸ Compare: Miss. Code of 1906, c. 85, 895; Brightleys, Digest of Penn. Laws, 1903, 57; S. C. Civil Code, 1902, 1148; 2 Ballinger, Codes & Stats. of Wash., § 5953.

⁹ 3 Gen'l Stats. of N. J., 1966.

¹⁰ 2 Rev. Stats. Codes & Gen'l Laws of N. Y., 3 ed., 2178.

tion.¹ And the courts of New York have decided that the debt is "contracted" within the meaning of the state law at the place in the state where the necessities are delivered to the purchaser.² In Maine it has been held that a contract for the delivery in Virginia of materials intended for a ship being built in Maine created a lien under the law of Maine, although the title to the articles passed in Virginia.³ It was stated, however, that the contract was actually made in the New England state. In a similar case⁴ the Supreme Court of Massachusetts denied a lien because they adjudged the contract to have been executed in Maryland.⁵

Referring to the "unrestricted power" of the states to create liens asserted in *The Iris*,⁶ Judge Dodge recently allowed liens claimed under the law of Maine, although he found that the petitioners "did not furnish" the necessities to the vessel, "in the sense of the maritime law, within the State of Maine, but made delivery of them to a carrier outside its limits."⁷ This decision seems to go on the theory that the states can impress domestic vessels with liens for necessities contracted for anywhere in the world, provided they are shipped to the *res* in the home state. And unless the local laws expressly limit the lien to debts for necessities ordered within the state, the court is apparently of the opinion that the place of contract should not be confined to the local jurisdiction. This may be so. Indeed the decisions in New Jersey and New York would seem to indicate that the courts intend to ignore the expressions of the legislatures upon this subject. But in our opinion the language of Judge Hanford, used in a slightly different connection, is a better interpretation of the purposes of the local legislators. He said: "In the

¹ *Baeder v. Carnie*, 15 Vroom (N. J.) 208 (1882).

² See *Phoenix Iron Co. v. The Hopatcong*, 127 N. Y. 206 (1891); *Mullin v. Hicks*, 49 Barb. (N. Y.) 250.

³ *Mehan v. Thompson*, 71 Me. 492.

⁴ *Tyler v. Currier*, 13 Gray (Mass.) 134, 135.

⁵ The case has been distinguished on the ground that the contract was entered into without an understanding that the materials were to be used for the vessel in question. *Lummus, Law of Liens*, 1904, § 219; *The Cimbria*, 156 Fed. 383. But the court was undoubtedly impressed with the argument that the law of the place of contract must be considered upon the question of the existence of a lien. *Cf. Mehan v. Thompson*, *supra*, 495, where the court says: "In order to ascertain whether a given contract was made with reference to any particular law the fundamental principle is to ascertain whether the contract was made at a place within the jurisdiction of that law."

⁶ *Supra*.

⁷ *The Cimbria*, 156 Fed. 383 (Apr. 25, 1907). *Cf. The Vigilancia*, *supra*.

matter of liens upon vessels, it is not ownership within the state which renders the vessel subject to the statute, but the fact of the transaction being within the state."¹ At least, it is hard to believe that the legislatures intended to burden domestic vessels with liens for the benefit of non-resident materialmen. It is to be noted, however, that the more liberal interpretation of the local statutes prevents a possible "gap" between the municipal and the general law, and for this reason it is justly commendable. It may also be said that if the place where the necessities reach the ship is the sole test, the *res* may likewise be without the local jurisdiction when the contract is made.

These are matters which the highest federal tribunal has yet to decide. The Supreme Court has been able to avoid some questions growing out of the construction of state statutes because of their alleged non-federal character,² but the cases will not always appear before them on writs of error from state courts. And meanwhile the inferior federal courts are saddled with the task of solving most intricate and unnecessary problems, because of the anomalous dual system now maintained in this country.

We do not assume to have treated all phases of the law of materialmen's liens or to have mentioned all the existing difficulties in the way of the interpretation and enforcement of such liens. But it is not too much to say that the need of a change in the law is abundantly evident. The diversity of the state statutes would alone justify action. Further, the large number of courts having jurisdiction of admiralty causes under our judiciary system tends to frequent conflicts of authority, and the amount involved in lien cases is ordinarily so small that appeals are seldom prosecuted to Washington.³ And since the Supreme Court has shown no disposition to correct previous errors, the only hope for the future lies with Congress.

What then should be the character of congressional legislation? That the eradication from our admiralty jurisprudence of the dis-

¹ *McRae v. Bowers Dredging Co.*, 86 Fed. 344, 350.

² See *The Winnebago*, 205 U. S. 354, 360.

³ It was not until 1897, in the case of *The Glide*, 167 U. S. 606, that the question of the constitutionality of the state laws in so far as they authorized a proceeding *in rem* in local courts was specifically determined, and a still longer time elapsed before the power of the states to legislate with reference to liens on foreign vessels was squarely in issue before the Supreme Court. *The Roanoke*, 189 U. S. 185, 196, 198-9 (1903).

inction between "foreign" and "domestic" vessels should be the first aim of a remedial enactment may be assumed. Further, it has been a chief object of this article to demonstrate the disturbing influence of the doctrine of presumption of credit to the owner. No attempt to rectify the law of materialmen's liens will be of real value if it does not change the rule of *The St. Jago de Cuba* and *The Valencia*, as well as that of *The General Smith*. It has also been shown that the law in regard to the essential elements in the creation of a lien for necessities is, in general, much confused, and we are accordingly convinced that federal legislation will not be successful unless it proceeds upon one of two theories: either (1) that all repairs upon or necessities delivered to a vessel by order of a person in authority shall give rise to a claim on the *res* without reference to the matter of credit; or (2) that no lien shall exist in the absence of an express agreement therefor, evidenced preferably by a writing.

It is of course to be understood that under the first alternative the lien may be waived by the materialman, and that an adequate stipulation between the parties that the necessities are not to constitute a claim on the ship will prevent the lien from attaching. The abandonment of the requirement of credit is suggested to assist in the settlement of the question of the origin of the lien, and because its enforcement in the past has been little better than a farce. The average materialman assumes, without knowing exactly why he does so, that the vessel he repairs or supplies is liable for his demands. When he is asked, as a witness in a particular case, whether or not he credited the ship, it is very easy for him to say honestly, in the light of his vague beliefs, that he did. In practice he may have charged the debt to the vessel, but in the majority of cases the question of "credit," strictly speaking, does not enter his mind when he makes the repairs or fills the orders that are left with him. Continually troublesome, what is the advantage of an insistence upon the theory?

With respect to the second alternative it is to be noted that the provisions of Article 192 of the present French Code go far toward making the claim recognized an express lien.¹ Judge Lowell has shown that there is authority for the statement that under the Roman law an express agreement to create a lien was necessary.²

¹ 1 Cresp., 119 *et seq.*; 2 Pouget, 541 *et seq.*; 1 de Valroger, 92; Goirand, 252 & 594

² *The Underwriter*, 119 Fed. 715.

May we not also inquire whether there is any urgent reason why *implied* liens for necessities should longer be recognized? The law which we administer was developed at a time when news travelled slowly. Today when communication can readily be effected with all parts of the world, do "the necessities of commerce" still demand the enforcement of the ancient rule?

Within the present century two bills have been introduced into Congress for the purpose of amending the law of the country with respect to materialmen's liens. The first, drafted by a committee of the Maritime Law Association of the United States, is generally consistent with existing American theories.¹ The bill, however, did not meet with universal approval, and consequently a second measure, containing features which can be traced to the French law, was introduced in the Senate the following year.² Nothing further has been accomplished, apparently because of the disagreement among those interested in the subject, but it ought not to be difficult to draft a statute satisfactorily correcting the most vital defects in the law, and securing uniformity throughout the country. Could the doctrine of *Ferry Co. v. Beers* be included as one of these defects and the voice of the case silenced in a constitutional manner, thus finally disposing of the rights of the states in the premises, the achievement would be complete.³

The authority of Congress to legislate with respect to liens on domestic vessels seems to be generally assumed, — at least, it has never been seriously questioned.⁴ The Supreme Court, however, has frequently asserted that under the Constitution the scope of the admiralty and maritime jurisdiction is a matter for the federal courts alone and cannot be affected by either the states or Congress.⁵ Inasmuch, therefore, as the highest federal court has but just reiterated⁶ that an agreement to build a vessel is not maritime, it may be doubted whether Congress could attach a maritime lien to the contract and make it enforceable in the admiralty courts.

¹ Senate Bill No. 6488; House Bill No. 15803, introduced Dec. 9, 1902.

² Senate Bill No. 160, Nov. 11, 1903.

³ Note the opportunity for conflict between the state and federal courts under the present anomalous conditions. *Lammus, Liens*, § 214.

⁴ See Mr. Justice Bradley in *The Lottawanna*, 21 Wall. (U. S.) 577-8, 580-1; *Hammond, J.*, in *The Rapid Transit*, 11 Fed. 326, 330; *Hughes, Adm.*, 102.

⁵ *The St. Lawrence*, 1 Black (U. S.) 522, 527 (*cf.* *The Lottawanna*, 21 Wall. (U. S.) 575-6, Bradley, J.); *The Belfast*, 7 Wall. (U. S.) 624, 640-1; *The Roanoke*, 189 U. S. 198. Note also Mr. Justice Brown in *The Blackheath*, 195 U. S. 361, 369.

⁶ *The Winnebago*, 205 U. S. 354.

But the situation is indeed unfortunate if, for the reason that the Supreme Court has declined to disturb a ruling founded upon a narrower view of the limits of the admiralty jurisdiction than is recognized in continental Europe, we are powerless to incorporate into the law of the United States an ancient provision of the maritime law of continental countries generally considered wise and correct in theory.¹

In any event it is hoped that some action will at once be taken, and if this article serve to reawaken interest in the subject to the end that Congress be induced to rescue the law from its present state — if only in part — it will have accomplished its full purpose.

Fitz-Henry Smith, Jr.

BOSTON.

¹ See Holmes, J., writing the opinion of the court in *The Blackheath*, 195 U. S. 364. And compare *The Lottawanna*, 21 Wall. (U. S.) 576-7; *The Roanoke*, 189 U. S. 198; *The Chusan*, 2 Story (U. S. C. C.) 462.

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STATE TAXATION OF THE PROCEEDS OF THE SALE OF IMPORTS.—The federal government has exclusive jurisdiction over interstate and foreign commerce whenever the national welfare requires uniformity of regulation.¹ And it is clear that the importation of goods from foreign countries and from one state to another is a subject of national importance. While a state may indirectly affect such importation in the exercise of its police power, as in the enacting of reasonable regulations for inspection and quarantine,² any direct restriction is invalid. The mere form of the regulation is immaterial—whether a direct tax upon the goods or a privilege tax.³ It is the substance and not the form which constitutes the test.⁴ The right of importation would, however, be valueless if as soon as the goods were within the state's jurisdiction they or the proceeds of their sale could be made subject to a discriminating tax in favor of domestic products.⁵ The case which established this principle declared unconstitutional a statute which discriminated against importers of foreign goods by requiring them to take out a license for the privilege of sale. Curiously enough, this case, which merely denied the right of a state to tax imports as imports, was later relied on to establish the principle that foreign goods were entirely exempt from taxation until sold or used by the importer, or until taken from the original package and thus incorporated with the general mass of property in the state. This doctrine of the original package does more than protect foreign

¹ *Cooley v. Board of Wardens*, 12 How. (U. S.) 299.

² *Morgan's S. S. Co. v. La. Board of Health*, 118 U. S. 455.

³ *Welton v. Missouri*, 91 U. S. 275.

⁴ *Postal Tel. & Cable Co. v. Adams*, 155 U. S. 688, 698.

⁵ *Brown v. Maryland*, 12 Wheat. (U. S.) 419. Nor can a state discriminate against products of another state by exempting domestic products from taxation. *Darnell v. Memphis*, U. S. Sup. Ct., Jan. 20, 1908.

goods from discrimination. It denies to the state the right to tax these goods in common with domestic goods, and in fact results in discrimination in favor of foreign and against domestic products.

The unfortunate consequences of this mistaken theory have caused it to be limited. The meaning of the term "original package" has been restricted to the narrowest possible construction,⁶ and the extension of the principle to goods brought from one state into another has been refused.⁷ Moreover, the Supreme Court has recently upheld the constitutionality of a state tax upon the proceeds of the sale of goods imported in the original package, when those proceeds were retained in the state in the form of bank deposits and bills for collection and remitted to the foreign principal only after the import duties and the expenses of importation and sale had been paid therefrom. *People v. Wells*, Jan. 6, 1908. Apart from the nature of the goods, such a tax upon cash and notes as capital employed in a business within the state is undoubtedly valid.⁸ And in this case, while the court admitted that the proceeds are not directly taxable,⁹ it held that they obtained a situs in the state, since they were retained for purposes of the business, and were thereby mingled with other goods in the state, and that they accordingly became subject to taxation. Unless, therefore, such proceeds are in transit, their immunity from taxation ceases. It is interesting to note that a similar tax upon amounts receivable on bills given for sales of goods in the original package was held unconstitutional by a state court on the ground that it was a tax upon the proceeds of the sale, before the proceeds themselves had been realized.¹⁰ The result of the present case, however, seems eminently sound. It is virtually a tax upon the business of importation. But there is no reason why such a business should not bear its proportionate share of the burden of taxation. Moreover the tax is in no way discriminatory against foreign commerce, and consequently is not a regulation of it.

EXTRA-TERRITORIAL EXTENT OF A STATE'S JURISDICTION IN PERSONAM. — Where a notice, a statutory substitute for a *subpoena duces tecum*, is served on a foreign corporation doing business within a state to produce certain corporation books formerly kept there, but at that time in another state, the very nature of jurisdiction seems to be involved. For the state, as sovereign, is in effect ordering the doing of an act in a foreign jurisdiction. The Supreme Court has recently decided, without discussion, however, that the state by its judicial officers is entirely competent to order this extra-territorial act and therefore can rightly punish disobedience as contempt. *Consolidated Rendering Co. v. Vermont*, 207 U. S. 541. This case is not alone in its readiness to assume that a state, as sovereign, has such a right.¹ If it exists as a right, however, it must be as part of the

⁶ See 18 HARV. L. REV. 530.

⁷ *Woodruff v. Parham*, 8 Wall. (U. S.) 123.

⁸ *New Orleans v. Stempel*, 175 U. S. 309.

⁹ *Cook v. Pennsylvania*, 97 U. S. 566.

¹⁰ *Paul Gelpi & Bro. v. Treasurer*, 48 La. Ann. 1535.

¹ *State v. United Copper Co.*, 30 N. J. L. J. 309. Copies of Books or Entries: *Erwin v. Oregon, etc., Co.*, 22 Hun (N. Y.) 566; *Natl., etc., Co. v. Van Emden*, 105 N. Y. Supp. 657. Partnership Books: *Fleischmann v. Fleischmann*, 31 N. Y. Misc. 216; *Holly Mfg. Co. v. Venner*, 86 Hun (N. Y.) 42. Cf. *United States v. Tilden*, 28 Fed. Cas. 174; *Snow, etc., Co. v. Snow-Church Surety Co.*, 80 N. Y. Supp. 512.

sovereign's jurisdiction *in personam*. And since that jurisdiction is ordinarily administered by the sovereign himself in equity,³ it would seem that the limits of jurisdiction in equity are also the limits of jurisdiction *in personam*. In equity, then, it is clear that when the parties are before the court the sovereign has the right, if the equity is clear, to order the defendant to convey land situated in a foreign jurisdiction;⁴ to order the removal of a cloud on foreign title;⁵ to require the cancellation and discharge of a void foreign mortgage;⁶ or the strict foreclosure of a mortgage on foreign land;⁶ or to order a sale of foreign land under a mortgage, if the person who has the power of sale is before the court.⁷ It is to be observed that the jurisdiction *in personam* is valid in these cases because the person and the act ordered are intra-territorial. The act affects foreign land only because the sovereign of the situs has consented that a deed shall pass title, wherever made.⁸ Equity courts would not have jurisdiction in any of these cases if livery of seisin were necessary by the law of the situs. Equity may also enjoin the defendant who is served within the territory of the sovereign from trespassing on foreign realty and from prosecuting an unconscionable foreign suit.⁹ Whether this jurisdiction is by virtue of the implied consent of the foreign sovereign, or is a relic of personal jurisdiction, or exists because no affirmative act is commanded on foreign territory, does not seem clear. But equity may not by reason of the inherent right of the sovereign order a positive act in a foreign jurisdiction.¹⁰

To explain this limitation of the sovereign's personal jurisdiction, it has been suggested that it is self-imposed because the sovereign will act only in cases where his power can be exercised effectively, and that the area of effectiveness is the territory of the sovereign.¹¹ This explanation contains a half-truth, but it errs in its conception of jurisdiction. Power is not the test of jurisdiction, it is only attendant on jurisdiction. Jurisdiction over persons and things gives the sovereign power to make and administer decrees and laws concerning them within his territory. If jurisdiction were merely a question of power, its extent would be simply a question of fact; it would be commensurate with the physical power of the sovereign. But continual usurpation and aggression would mean the disorganization of legal systems; for law connotes order and stability, neither of which is possible unless nations sanction the inherent right of sovereigns to exercise jurisdiction over persons, things, and acts within their recognized territorial boundaries.¹²

But, as the mutual benefit of nations is promoted by intercourse, sovereigns are often willing to relax their complete territorial jurisdiction and consent to give effect to an act ordered by a foreign sovereign.¹³ Moreover, in the American states the fact of federal union, the relinquishment of

³ Langdell, *Brief Survey of Equity Jurisd.*, 23.

⁴ See *Fall v. Fall*, 113 N. W. 175 (Neb.).

⁵ See *Hart v. Sansom*, 110 U. S. 151, 155.

⁶ *Williams v. Fitzhugh*, 37 N. Y. 444.

⁶ *House v. Lockwood*, 40 Hun (N. Y.) 532.

⁷ *Muller v. Dows*, 94 U. S. 444.

⁸ See 20 HARV. L. REV. 382, 392.

⁹ See 15 HARV. L. REV. 579; Ames, *Cas. on Equity Jurisd.*, 28n.

¹⁰ *Port Royal R. R. v. Hammond*, 58 Ga. 523. See *Picquet v. Swan*, 5 Mason (U. S. C. C.) 35.

¹¹ Dicey, *Conf. of Laws*, 40.

¹² See *Schooner Exchange v. M'Faddon*, 7 Cranch (U. S.) 116. Cf. *Picquet v. Swan*, *supra*.

many of the prerogatives of sovereignty by the states, and their community of interests, are arguments for implying consent in interstate legal relations where, as between foreign sovereigns, express consent would be necessary to give the right to order the extra-territorial act. The principal case may rest on such implied consent. But, as this consent would be as broad as national policy might direct, its limits are uncertain and its very existence is disputable.

DEDICATION RESTRICTED BY THE DEDICATOR. — The doctrine of dedication is an anomaly in our law. Its existence is due to the public policy of giving effect to the intention of individuals to confer benefits upon the public.¹ But when a dedicator seeks to place restrictions on the land he dedicates, a conflict of interests is presented. This conflict may exist in regard to reservations or limitations in favor of the dedicator, or to conditions imposed on the gift.

Certain reservations are consistent with the public user, and are therefore permitted.² But limitations which would be inconsistent with such user raise the issue, shall the grant fall or the limitation be disregarded? Unfortunately the courts have frequently avoided the question by going to great lengths to find that no inconsistency existed. Thus, for example, a road may be closed at all times to coal-wagons alone, or for seven months in the year to everybody.³ It is hardly necessary to comment upon the situation, if the user of many of our highways was thus limited. This attitude of the courts is comprehensible as a compromise between tenderness toward the dedicator and consideration for the public. Still it would seem preferable to be more ready to give effect to the public policy against such limitations, and to face the issue frankly. If the owner had both the *animus dedicandi*⁴ and an intention to impose an inconsistent limitation, some cases say that no dedication results,⁵ thus making predominant considerations of fairness to the individual. The more modern tendency, however, seems to be to say that the grant is good and that the limitation falls.⁶ This result would appear to be more in keeping with the line of thought that found the claims of the public in these matters sufficiently strong to justify the creation of the doctrine of dedication. As an analogy pointing strongly this way, there is the holding that a wife loses her dower right in land dedicated by her husband without her consent, because "the public [right] shall be preferred before the private."⁷ The rule that a limitation repugnant to a grant is void, furnishes another supporting analogy.⁸

¹ See *Cincinnati v. White's Lessee*, 6 Pet. (U. S.) 431, 434; *Jersey City v. Morris*, etc., Co., 12 N. J. Eq. 545, 562; 16 HARV. L. REV. 329.

² *Noblesville v. Lake Erie*, etc., Ry., 130 Ind. 1; *Tallon v. Hoboken*, 60 N. J. L. 212, 217.

³ *Stafford v. Coyney*, 7 B. & C. 257; *Hughes v. Bingham*, 135 N. Y. 347. See also *Arnold v. Blaker*, L. K. 6 Q. B. 433. Further, these decisions seem inconsistent with the line of cases holding that the user must be for the whole public. *Poole v. Huskinson*, 11 M. & W. 827; *Trustees v. Hoboken*, 33 N. J. L. 13, 18.

⁴ If in view of the limitation it is found that the owner did not have the *animus dedicandi*, the public acquires no rights. *White v. Bradley*, 66 Me. 254.

⁵ *Poole v. Huskinson*, *supra*; see *Stafford v. Coyney*, *supra*, 260; *Mercer v. Woodgate*, L. R. 5 Q. B. 26, 31. But see *Arnold v. Blaker*, *supra*, 437.

⁶ See *Richards v. Cincinnati*, 31 Oh. St. 506; *Haight v. Keokuk*, 4 Ia. 199, 210; *Noblesville v. Lake Erie*, etc., Ry., *supra*, 4; *State v. Spokane*, etc., Co., 19 Wash. 518, 532.

⁷ Co. Lit. 31 b. See 20 HARV. L. REV. 407.

⁸ 1 *Tiffany*, Real Property, 171; *State v. Trask*, 6 Vt. 355, 364.

The problem in regard to conditions raises very similar issues. If a condition precedent to user is imposed, there is no difficulty in requiring it to be fulfilled before the public acquires rights.⁹ But conditions subsequent stand on a different basis. It is more than inconvenient for the public to have to retire from land which it has been accustomed to use, and upon which it has expended money. The question arises most frequently thus: a man dedicates land for a certain purpose, and the public so uses it for a time; then an attempt is made to put it to another use, whereupon the dedicator brings ejectment on the theory of reverter for breach of condition. Because of a natural aversion to forfeitures, there has become well recognized a rule in regard to grants that courts will construe what is in form a condition subsequent as a covenant, in order to carry out what they consider the real intentions of the parties.¹⁰ Then further, in these cases of dedication, on the ground that public policy demands that the public should not incur a forfeiture, the courts disregard intention, treat all conditions as covenants, and deny a writ of ejectment.¹¹ Accordingly, an injunction to prevent the misuse will be granted.¹² An interesting variation is suggested by a recent case. A man dedicated land to a municipality upon condition that a street be constructed thereon, and that the abutting property-owners be free from assessment therefor and for other street improvements. The municipality accepted, built the street, and then sought to assess the abutting property-owners therefor, but without success. *Perth Amboy Trust Co. v. Perth Amboy*, 68 Atl. 84 (N. J., Sup. Ct.). If we regard the cost of the particular improvement in the parties' contemplation as the price paid for the land, the decision seems supportable, the second condition being construed as a covenant, which is specifically enforced. But exemption from all future assessments would seem to be beyond the municipality's authority.¹³ Illegal conditions subsequent are disregarded.¹⁴ Accordingly, it would seem that this much of the arrangement, construed as condition or covenant, should be given no effect.¹⁵

STATE CONTROL OVER MARITIME RIGHTS. — Although to obtain general uniformity in the maritime law Congress was given the right to legislate as to maritime matters, much power remains in the states. Of course, rules of maritime law national in their scope cannot be changed by a state, nor is any state law valid which is contrary to the fundamental principles of maritime law.¹ But the federal government not only fails in certain cases

⁹ *People v. Williams*, 64 Cal. 498. A condition reserving the right to resume or change the use prevents dedication. *San Francisco v. Canavan*, 42 Cal. 541, 553. Cf. *Fitzpatrick v. Robinson*, 1 Hud. & B. 585.

¹⁰ *Avery v. New York, etc.*, R. R., 106 N. Y. 142.

¹¹ *Cincinnati v. White's Lessee*, *supra*; *Barclay v. Howell's Lessee*, 6 Pet. (U. S.) 498, 507. But the dedicator can recover the land when the public abandons it, or the appointed use becomes impossible. *Halley v. Scott County*, 78 S. W. 149 (Ky.); *Campbell v. Kansas City*, 102 Mo. 326. See *Rowzee v. Pierce*, 75 Miss. 846.

¹² *United States v. Ill. Cent. R. R.*, 154 U. S. 225; *Church v. Portland*, 18 Ore. 73; *Warren v. Lyons City*, 22 Ia. 351.

¹³ 2 Dill, Mun. Corp., 4 ed., § 781 n.; *Smith, Mun. Corp.*, §§ 637, 1489. But see *Bartholomew v. Austin*, 85 Fed. 359.

¹⁴ *St. Louis, etc., R. R. v. Mathers*, 71 Ill. 592; *Scovill v. McMahon*, 62 Conn. 378.
¹⁵ *Armstrong v. St. Mary's*, 21 Oh. Circ. Ct. Rep. 16; *Richards v. Cincinnati*, *supra*.
St. Louis v. Meier, 77 Mo. 13.

¹ *Workman v. The Mayor*, 179 U. S. 552; *The Lyndhurst*, 48 Fed. 839.

to assume exclusive jurisdiction, but expressly leaves certain judicial powers in the states, such as the jurisdiction over crimes committed within the three mile limit² and the authority to try all maritime actions *in personam* in the state courts as well as in admiralty.³ Considerable legislative power also exists in the states in the absence of congressional action, for much of the maritime law is of purely local effect and much, indeed, is identical with the municipal law. Thus the courts hold quarantine⁴ and pilotage⁵ laws valid under the police power and uphold laws creating maritime liens⁶ because of their local nature. And in general the regulation of the ordinary rights of persons and property within the territorial waters of the state is subject to state control.

A good test of the power to create rights of this last class is the effect given to the state statutes allowing an action for death by wrongful act, for which no remedy is otherwise provided in admiralty.⁷ If the death takes place within the territorial waters of a state, the state statute becomes a part of the maritime law of that territory and an action is allowed in both the state⁸ and the admiralty courts,⁹ although a libel *in rem* will not be allowed unless the statute created a lien. It has been argued that there are two concurrent systems of laws operative within the territorial waters, the general maritime law and the state law. But although state and admiralty courts sometimes disagree as to what the law is,¹⁰ the truth must be that but one law operates; and that law is the common maritime law as modified by state statutes. Thus, defenses good by the state law which created the right, such as contributory negligence, are good in admiralty when suit is brought there for death by wrongful acts.¹¹ Similarly in a suit in the state courts, as the death happened at sea, general maritime defenses such as the statute limiting liability apply.¹²

There is a further question as to the operation of this modified maritime law on vessels on the high seas owned by citizens of the state. It is universally recognized that the law of private vessels on the high seas is the law of the country of the owner, though there is conflict as to whether the jurisdiction is territorial or personal.¹³ The state laws undoubtedly operate on the vessel unless that power has been ceded away. But the Constitution provides for no such surrender of sovereignty on the part of the states, and our courts have consistently treated vessels as belonging to the states of their owners, even to the extent of treating them as "foreign" vessels in other states.¹⁴ The objections to the operation of state laws on the vessel in these cases apply equally to their operation within the territorial waters of the state. It has therefore been held that when death is caused

² U. S. Rev. Stat. § 5339.

³ U. S. Rev. Stat. § 563, cl. 8.

⁴ *Morgan's, etc., Co. v. La. Board of Health*, 118 U. S. 455.

⁵ *Ex parte McNeil*, 13 Wall. (U. S.) 236.

⁶ *The Lottawanna*, 21 Wall. (U. S.) 558.

⁷ *The Harrisburg*, 119 U. S. 199; *The Alaska*, 130 U. S. 201.

⁸ *Sherlock v. Alling*, 93 U. S. 99.

⁹ *The Albert Dumois*, 177 U. S. 240.

¹⁰ See *Workman v. The Mayor*, *supra*; *Liverpool Co. v. Phenix Ins. Co.*, 139 U. S. 397.

¹¹ *Robinson v. Detroit, etc., Co.*, 73 Fed. 883.

¹² *Loughin v. McCauley*, 186 Pa. St. 517. *Contra*, *Duffy v. Gleason*, 26 Ind. App. 180.

¹³ Wharton, *Conf. of Laws*, § 356; Hall, *Treatise on Internat. Law*, 253-4.

¹⁴ *Crapo v. Kelly*, 16 Wall. (U. S.) 610. See *The Roanoke*, 189 U. S. 185.

by a collision on the high seas between two vessels owned by citizens of the same state, recovery may be had in an admiralty court under the state statute. *The Hamilton*, 207 U. S. 398. This case is also important as it recognizes that the controlling law is the law of the vessel and not a general maritime law—a basic idea of certain much criticized cases in the lower courts.¹⁵

THE UNITY OF ESTATES NECESSARY TO EXTINGUISH AN EASEMENT. — The notion, found in the civil law, that one piece of land could have rights as against another piece of land,¹ was easily assimilated by the medieval legal mind.² That conception, unreasoning as it seems, cannot be wholly ignored today. It is fundamental that easements are an incident of land, even to the extent that a disseisor is entitled to the enjoyment.³

Property may be said to give the entitled party the power of applying it to all purposes; an easement to give the entitled party the power of applying the subject—that is, the servient tenement—to exactly determined purposes.⁴ Two estates are thus presupposed, the dominant and the servient. Then, as an easement is a definite subtraction, accruing to the owner of the one, from the indefinite right of user or exclusion residing in the owner of the other, it follows that no one has an easement over his own land, for otherwise he would have a right in a thing against himself. Thus results the doctrine that if the two estates become united in ownership the easement is extinguished. The particular right is merged in the more extensive right, and the user becomes an act of property. The reason of the rule gains strength, in reality, from the so-called exception of the easement of watercourses, for there the user is not adverse.⁵ And so in the case of a warren.⁶ But the doctrine stands on a more technical ground than that of mere unity of ownership, as it is commonly stated. There must be unity of seisin.⁷ Even then, if the estates are of different duration, the easement is merely suspended.⁸ The user is then just as clearly an act of property, but the distinction is perhaps to be attributed to a medieval conception that in such cases the two pieces of land were not completely welded. In short, the principle seems to be that, in order to work extinction of the easement by merger, the owner of the two tenements must have an estate in fee simple in both of an equally durable, indeterminable nature.⁹

The further question arises, whether unity of possession or enjoyment must be added to the unity of seisin. A recent decision of the English Court of Appeal that, where the owner of the dominant tenement, who had a tenant, conveyed to the owner of the servient, an easement of light was

¹⁵ See 21 HARV. L. REV. 1, 75.

¹ See D. 8, 4, 12, . . . "that land is bound to land."

² See Bracton, fol. 220 b, § 1. "One estate is free, the other subjected to slavery."

³ See Holmes, Common Law, 381.

⁴ See Austin, Jurisp., 4 ed., 823.

⁵ *Sury v. Pigot*, Poph. 166. "The thing hath its being *ex jure naturae*."

⁶ *Y. B.*, 35 Hen. VI, f. 55, 56, since, they say, "a man may have a warren in his own land."

⁷ *Thomas v. Thomas*, 2 C. M. & R. 34; *Dority v. Dunning*, 78 Me. 381 (unity of an estate in fee and an estate for years).

⁸ *Rex v. Inhabitants of Hermitage*, Carth. 239 (unity of a fee simple indeterminable with a fee simple determinable); *James v. Plant*, 4 A. & E. 749 (unity as coparcener in fee simple and tenant in common in tail general).

⁹ See Gale, Easements, 7 ed., 486.

not extinguished as against the tenant, appears, at first sight, an authority for such a broad doctrine. *Richardson v. Graham*, [1908] 1 K. B. 39. But this case stands on its own ground and is but a logical conclusion from a recent decision of the House of Lords,¹⁰ following two earlier cases,¹¹ to the effect that, in order to acquire an easement of light under the Prescription Act,¹² the user need not be of right, but need only be actual for the prescriptive period, and that hence one termor can prescribe for such an easement as against another under a common landlord. Then, if the common ownership does not prevent the acquisition of the easement of light, a merger of the two estates should not operate against the tenant to extinguish the easement already acquired, unless the conveyance gives also the right to possession. This brings out admirably the intrinsic nature of the general principle. If, in order to acquire the easement, the user must be adverse to the land, as in the ordinary easement, one termor cannot prescribe as against another under a common landlord,¹³ or as against his landlord.¹⁴ Therefore it results, conversely to the anomalous easement of light, that as unity of seisin will prevent the acquisition of the ordinary easement, so a merger of the two estates in fee simple, though without unity of possession, will work an extinction — a conclusion not without support.¹⁵

WHETHER A TESTAMENTARY GIFT TO A CLASS INCLUDES A CHILD EN VENTRE SA MÈRE. — In many cases of bequest or devise, where the person or persons entitled to the benefit are to be determined on some particular event, the courts have included a child *en ventre sa mère* when the event actually occurred. In both England and the United States this result seems now to be uniformly reached when the devise or bequest runs to "children" or "grandchildren" as a class,¹ to a "son,"² or to one "living" at the particular time.³ In other cases such children have been included when the words were "issue then living,"⁴ one "born,"⁵ to J., if B. "hath no son,"⁶ or "sons born and begotten."⁷ In all these cases nothing is made to turn on whether the particular event is the death of the testator, or that of some other person, or the termination of a period of years.⁸ Further, when neither a benefit nor a detriment, a child *en ventre sa mère* has been included when the will ran, to "children,"⁹ "issue living,"¹⁰ or "leaving issue."¹¹ When, however, it is detrimental to the

¹⁰ *Morgan v. Fear*, [1907] A. C. 425.

¹¹ *Frewen v. Philipps*, 11 C. B. (N. S.) 449; *Mitchell v. Cantrill*, 37 Ch. D. 56.

¹² 2 & 3 Wm. IV, c. 71, § 3.

¹³ *Kilgour v. Gaddes*, [1904] 1 K. B. 457.

¹⁴ *Gayford v. Moffatt*, L. R. 4 Ch. 133.

¹⁵ See *Buckby v. Coles*, 5 Taunt. 311, 315; *Clayton v. Corby*, 2 Q. B. 813, 826.

¹ *Crook v. Hill*, 3 Ch. D. 773; *Swift v. Duffield*, 5 Serg. & R. (Pa.) 38.

² *Reeve v. Long*, 1 Salk. 227; *Stedfast v. Nicoll*, 3 Johns. Cas. (N. Y.) 18.

³ *Doe v. Clarke*, 2 H. Bl. 399; *Randolph v. Randolph*, 40 N. J. Eq. 73.

⁴ *Laird's Appeal*, 85 Pa. St. 339.

⁵ *Trower v. Butts*, 1 Sim. & St. 181; *Baker v. Pearce*, 30 Pa. St. 173.

⁶ *Blackburn v. Stables*, 2 Ves. & B. 367.

⁷ *Whitelock v. Heddon*, 1 B. & P. 243.

⁸ See *Pearce v. Carrington*, L. R. 8 Ch. 969.

⁹ *Groce v. Rittenberry*, 14 Ga. 232.

¹⁰ *In re Burrows*, [1895] 2 Ch. 497. *Contra*, *Blasson v. Blasson*, 2 De G. J. & S. 665; See 9 HARV. L. REV. 349.

¹¹ *Bedon v. Bedon*, 2 Bailey (S. C.) 231.

child to regard him as born, two American courts have not included him,¹² and a recent English case has reached this result.¹³ The House of Lords declared that the cases recognizing a fixed rule of construction, when the words of the will were "living" at the particular time, form a class by themselves — a ruling which by implication seems to require that in other cases the words of the will be construed in their literal sense. More recently the Court of Appeal has decided that the words "born previously to the date of this my will" include a child *en ventre sa mère* at the date of the will, it being for the child's benefit, and states that the rule of construction is fixed in all cases for the child's benefit, not only when the will describes a person "living," but when it describes a person "born." *In re Salzman*, [1908] 1 Ch. 4. In view of the fact that an anomaly has been admitted to the law on this subject — for every child *en ventre sa mère* cannot be regarded as living, and nothing now turns on the length of time since conception¹⁴ — it seems that it is an undue refinement to give the words "living" and "born" a different meaning.

Obviously it is more convenient from a purely legal point of view that there should be a fixed rule in all cases. A tendency in this direction is manifested (1) by the uniformity with which the general words in statutes of descent are held to include a child *en ventre sa mère*,¹⁵ (2) by the now solidified rule that such children are regarded as born, irrespective of the question of benefit, in the case of the Rule against Perpetuities,¹⁶ (3) by the occasional cases where they are considered as born when neither to their benefit or detriment. In view of this tendency, of the rareness of the cases in which it is not for the child's benefit to hold him born, and of the inaccuracy attendant on attributing to a testator intentions in regard to circumstances obviously unforeseen in the will, it would seem, on the whole, better to consider a child *en ventre sa mère* as born in every case of a devise or a bequest to persons to be determined on some particular event.

THE TERRITORIAL EXTENT AND SITUS OF TRADE-MARKS. — Relief from infringement of trade-marks or trade-names is usually given upon one of three principles: judicial recognition that the user has become invested with a property right in the mark or name;¹ the presence of features of unfair competition;² or deception of the public as to the origin of the goods.³ The courts recognize a property right in such marks only as are mere arbitrary symbols or in such names as are fanciful and in no way descriptive of the article. If the mark or name is descriptive, unfair competition must be shown. The reason for this distinction lies in the fact that if the originator of the symbol or fanciful name has invented and applied to

¹² *Armistead v. Dangerfield*, 3 Munf. (Va.) 20; *M'Knight v. Read*, 1 Whart. (Pa.) 213.

¹³ *Villar v. Gilbey*, [1907] A. C. 139 (any son born in my lifetime). See 19 HARV. L. REV. 624.

¹⁴ *Trower v. Butts*, *supra*. In *Hall v. Hancock*, 32 Mass. 255, the child was born eight months and seventeen days after the testator's death.

¹⁵ *Smith v. McConnell*, 17 Ill. 135; *Pearson v. Carlton*, 18 S. C. 47.

¹⁶ *In re Wilmer's Trusts*, [1903] 2 Ch. 411. See 16 HARV. L. REV. 601.

¹ *Bass v. Feigenspan*, 96 Fed. 206.

² *Shaver v. Heller, etc., Co.*, 108 Fed. 821.

³ *Samuel v. Berger*, 24 Barb. (N. Y.) 163.

his goods a mark indicative of its origin which has never before been used, he is entitled to a property right in it.⁴ But where the name is descriptive he can acquire no title, since the property right is already in the general public.⁵ But given a case where the user has acquired a property right in the mark, is such right limited by any geographical boundaries? It is sometimes said that no such restriction exists.⁶ By the better view, however, this statement must be modified. It is well settled that a trade-mark can have no existence apart from the business with which it is connected and cannot be assigned apart from such business.⁷ It must, therefore, be restricted within the territorial scope of the business. Moreover, upon principle it would seem that, the property being a mere monopoly created by law, no extra-territorial effect can be given such law.⁸ Thus a right acquired by one person in Germany is of no avail as against a *bona fide* user of the same mark in America.⁹ There seems to be no direct authority as to the situs of this property right in a trade-mark or trade-name, but, since it is inseparable from the business, the situs must be the place where the business is carried on. It follows that when the business is conducted in two countries, there must be two distinct property rights existing independently in each country.

These conclusions are well illustrated by a recent federal decision. The plaintiffs had been engaged in France in the manufacture of a liqueur which they called "Chartreuse," and the product had been sold under that name for a number of years in this country. The French government confiscated the plaintiff's property, and the trade-name in question was transferred to the defendants. The plaintiffs removed to another country and continued to use the name. The defendants were enjoined from using the trade-name in the United States.¹⁰ *Baglin v. Cusenier Co.*, 156 Fed. 1016 (Circ. Ct., N. D. N. Y.). The court found that "Chartreuse" was a valid trade-mark, not a mere descriptive word. The plaintiffs were therefore possessed of two property rights, one situated in France and one in America, and as confiscation can only affect such property as can actually be seized,¹¹ the American property right remained in the plaintiffs. The decision may also be supported on the third ground upon which protection is granted, that the acts restrained amounted to a fraud on the public. Moreover, the business of the plaintiffs did not pass to the defendants, since the recipes for the manufacture were not disclosed. Therefore no property passed, and the confiscation merely amounted to a declaration that it was not unfair competition for the defendants to use the words. This, of course, was of no extra-territorial effect.

⁴ Browne, Trade-Marks, 2 ed., § 46.

⁵ See *Helmbold v. Helmbold, etc., Co.*, 53 How. Pr. (N. Y.) 453, 458.

⁶ *Derringer v. Plate*, 29 Cal. 292.

⁷ See *Congress, etc., Co. v. High Rock, etc., Co.*, 57 Barb. (N. Y.) 526, 551.

⁸ See *Vacuum Oil Co. v. Eagle Oil Co.*, 122 Fed. 105.

⁹ *Richter v. Reynolds*, 59 Fed. 577.

¹⁰ Similarly, the English Court of Appeal has recently granted an injunction against the use of the name in England. *Rey v. Lecouturier*, 124 L. T. 195. As the case is not reported in full, the grounds upon which the English court reached this result are not entirely clear, but the decision seems to be based on the third principle—deception of the public.

¹¹ *The Ann*, 9 Cranch (U. S.) 289.

RECENT CASES.

ADMIRALTY — JURISDICTION — STATE CONTROL OVER MARITIME RIGHTS. Several persons were killed in a collision on the high seas between two vessels owned by citizens of Delaware. Suit was brought in an admiralty court under a Delaware statute which allowed an action for death by wrongful act. *Held*, that the action will lie. *The Hamilton*, 207 U. S. 398. See NOTES, p. 357.

ADVERSE POSSESSION — WHAT CONSTITUTES — POSSESSION UNDER UNRECORDED DEED. — In 1891 A conveyed land to C, who re-conveyed to A and B. The first deed was recorded. C forged a certificate of registration on the second deed, which was not in fact recorded. In 1895 C mortgaged the land to the plaintiff, who was without notice of the unrecorded deed. In 1903 the plaintiff brought an action to enforce the mortgage against A and B, who had been in actual, open, and continuous possession of the land under a claim of title in themselves for the whole period. The statute of limitations was ten years. *Held*, that the plaintiff may recover. *McVity v. Tranouth*, [1908] A. C. 60.

By the registry laws unrecorded deeds were void as to subsequent purchasers or mortgagees without actual notice, but valid as between the parties. *Cf. McGregor v. Kerr*, 29 Nova Scotia 45. The defendants' possession between 1891 and 1895 consequently had all the essential elements of adverse possession necessary to claim the benefit of the statute except the existence of a right of action against them. Although it is generally stated that a grantee's possession is adverse to his grantor, only one case has been found which applied the doctrine to possession that no one had a right to disturb. See *Sutton v. Pollard*, 96 Ky. 640, 644. The case of a donee of land under an oral gift is distinguishable, because the donor can at any time oust him or bring ejectment, the gift being void by the statute of frauds. *Cf. Vandiveer v. Stickney*, 75 Ala. 225. Moreover, an analogy to the present case is found in the case of negative easements. Where the acquisition of easements by adverse user is based on the analogy to the statute of limitations, negative easements cannot be acquired by adverse user because there is no right of action. *Napier v. Bulwinkle*, 5 Rich. Law (S. C.) 311; *cf. Parker v. Banks*, 79 N. C. 480, 485.

ALIENS — ENFORCEMENT BY ASSIGNEE OF CONTRACT TO CONVEY LAND TO ALIEN. — Civil Code of South Carolina, 1902, § 1795, provided that "no alien either in his own right, or as trustee or *cestui que trust*, shall own or control more than five hundred acres of land." The defendant contracted to convey more than five hundred acres to the plaintiff's assignor, an alien. *Held*, that the plaintiff, a resident, may enforce specific performance. *Tucker v. Atlantic Coast Lumber Co.*, 59 S. E. 859 (S. C.).

A statute passed in 1872 gave aliens the same capacity to own and acquire property as citizens. See CIV. CODE OF S. C., 1902, § 2360. The court construes the present statute merely to revive the common law as to land exceeding the prescribed amount. At common law, an alien could take by purchase and hold equitable as well as legal estates in land, defeasible only by the sovereign. *Cross v. De Valle*, 1 Wall. (U. S.) 3. A contract to convey was enforceable against an alien vendee. *Scott v. Thorp*, 1 Edw. Ch. (N. Y.) 512. Since generally an alien could defend, but not enforce, his rights in land, it is probable that an alien vendee could not obtain specific performance. *Cf. Williams v. Myers*, 8 Nova Scotia 157; *Hubbard v. Goodwin*, 3 Leigh (Va.) 492. But in the case of an express trust for an alien, the *cestui's* assignee, or the sovereign, could proceed against the trustee on the ground that an interest passed to the alien in spite of his personal incapacity to enforce it. See *Murray v. Heron*, 7 Grant Ch. (U. C.) 177; *Sharp v. St. Sauveur*, L. R. 7 Ch. 343. This theory

somewhat stretches the notion of a vendee's equitable title, which is usually considered synonymous with enforceability. But public policy, as illustrated in the analogous doctrine of transfer of title through corporations, acting *de facto* or *ultra vires*, favors the present result.

BANKRUPTCY — PROVABLE CLAIMS — ANTICIPATORY BREACH OF CONTRACT. — A promise was given to buy stock at a certain future date on the tender of the certificate by the holder. Before the time fixed, the promisor was adjudged a bankrupt and a trustee appointed. The certificates were tendered to the trustee. The promisee wished to be allowed to prove his claim. *Held*, that his claim is provable, since by offering to file it he has elected to treat the contract as broken. *In re Neff*, 157 Fed. 57 (C. C. A., Sixth Circ.).

For a discussion criticizing a similar decision reaching the opposite result, see 20 HARV. L. REV. 66.

BANKRUPTCY — RIGHTS AND DUTIES OF BANKRUPT — RIGHT TO EFFECT COMPOSITION BEFORE ADJUDICATION. — Upon reference of an involuntary petition, the bankrupt corporation asked to be allowed to attempt a composition with creditors before adjudication. *Held* (by the referee), that a composition can be effected before adjudication. *In re Back Bay Automobile Co.*, 19 Am. B. Rep. 33 (Dist. Ct., D. Mass., Nov. 1907).

If the court may call meetings of creditors before adjudication, then certainly all conditions required for such a composition may be fulfilled. Section 55 *e* of the Bankruptcy Act provides that a meeting may be called whenever one-fourth of those who have proved their claims shall so request. The referee interpreted this section as meaning that meetings of creditors may be called prior to adjudication. Such an interpretation, however, seems directly in conflict with § 55 *a*, which expressly provides that the first meeting of creditors shall be held not less than ten days after adjudication. But even if the referee is wrong on this point, a composition before adjudication seems possible. In no step of the proceedings prescribed for a composition by § 12 of the present Act is an adjudication or a meeting of creditors expressly made essential. *Cf.* BANKRUPTCY ACT OF 1874. U. S. REV. STAT., § 5103 *a*. Moreover, such a requirement cannot be implied from the express conditions of compositions that the bankrupt be examined in open court and that a certain number of creditors whose claims have been allowed shall accept the composition in writing. *Cf.* *In re Fleisher*, 151 Fed. 81; BANKRUPTCY ACT OF 1898, §§ 57 *d*, 57 *f*.

BOUNDARIES — EXTENSION OF CITY BOUNDARIES INTO NAVIGABLE RIVER. — The boundary of a city was the shore of a navigable river. A railroad owning land on the river-front erected permanent piers resting on piles. By statute the title to such improvements vested in the riparian owners, and not in the state. *Held*, that the city boundary is coincident with the boundary of the pier, and that the latter is taxable by the city as property within its limits. *Western Md. T. R. Co. v. Mayor, etc., of Baltimore*, 68 Atl. 6 (Md.).

It is well settled that, unless expressly authorized by statute, a city cannot tax land outside city limits. *Gilchrist's Appeal*, 109 Pa. St. 600. Land acquired by natural accretion, however, would be within the city limits, since the boundary should change as the actual shore-line changes, where the shore is expressly made a boundary. *Cf. East Omaha Land Co. v. Jeffries*, 40 Fed. 386, 392. Similarly, solid piers or wharves of filled-in earth or stone, the construction of which is permitted by statute, would be within the city's jurisdiction, the actual shore-line being as much changed by them as by natural accretion. See 2 DILL., MUN. CORP., 748. But it is difficult to call a pier on piles, under which the water flows as before, a new shore. Hence the boundary seems unchanged in the present case. *Cf. Ft. Smith, etc., Co. v. Hawkins*, 54 Ark. 509. It may be urged, however, that the result of denying the city jurisdiction — that if many such piers were built the city would be as effectually shut off from its water front as by solid piers — would clearly violate the intended effect of the limitation in the city charter.

CARRIERS — TICKETS — INJUNCTION AGAINST TICKET-BROKERS. — The defendant ticket-brokers intended to buy and sell special reduced rate non-transferable tickets about to be issued by the plaintiff. *Held*, that the threatened sale of such tickets may be enjoined. *Bitterman v. Louisville & Nashville R. Co.*, 207 U. S. 205.

The precise legal nature of railroad tickets is by no means settled. Some authorities regard them as contracts, some as the evidence of contracts, some as mere vouchers. But, under any view, the ticket is a means adopted by the carrier and passenger to aid in the execution of their contract; and in every case where the right to be carried is non-transferable, the passenger either expressly or impliedly contracts not to transfer the ticket. *See D. L. & W. R. R. Co. v. Frank*, 110 Fed. 689, 692. Accordingly the court rests its decision upon the familiar principle that any third person inducing a breach of contract by a promisor is liable in tort to the promisee. In the present case an injunction is the only adequate remedy because of the multiplicity of suits necessary to recover damages and the practical impossibility of detecting the great majority of the illegal transactions. Consequently, since the legal remedy is inadequate, equity will give relief. Although a new application of an established doctrine, the reasoning of the court seems irrefutable and the same result has frequently been reached upon different grounds. *See Nashville, etc., Ry. v. McConnell*, 82 Fed. 65.

CONFLICT OF LAWS — MAKING AND VALIDITY OF CONTRACTS — CONTRACTS CONCERNING LAND. — The defendant contracted in Minnesota to sell land in Colorado to the plaintiff. The contract contained a clause that if the plaintiff should fail to pay at a specified time the contract should be voidable at the defendant's option. This clause was valid according to Colorado law but invalid according to Minnesota law. On the plaintiff's failure to pay as required, the defendant notified him of his repudiation of the contract. *Held*, that the plaintiff may recover damages for failure to convey. *Finnes v. Selover, etc.*, Co., 113 N. W. 883 (Minn.).

It is undoubted law that interests in real estate can be acquired or lost only in accordance with the *lex loci rei sitæ*. *Roberston v. Pickrell*, 109 U. S. 608. But contracts to convey land are not necessarily governed by the same law. Thus a contract to convey, valid at the place where made, will be enforced at the place where the land is situated, although such contract would have been void if made in the latter state. *Polson v. Stewart*, 167 Mass. 211; see 10 HARV. L. REV. 523. And in general where the defendant has put himself under obligations with regard to land, either *ex contractu* or *ex delicto*, relief will be granted where such obligation arose, regardless of the law of the situs. *Ex parte Pollard*, Mont. & C. 239; see 20 HARV. L. REV. 382. It follows from these cases that the validity of the contract depends upon the *lex loci contractus*, and that relief will be granted in such state in spite of the law of the situs. To be sure, if the latter refuses to recognize an interest as being created in the *res*, relief *in rem* is impossible, but relief *in personam*, as in the present case, should be granted.

CONFLICT OF LAWS — MARRIAGE — JURISDICTION FOR NULLIFICATION. — A, an Englishwoman, was married in England to B, a Frenchman. This marriage was declared void by the French court because B, who was not of full age by French law, had not obtained the parental consent. A then married C in England. C sought a decree of nullity on the ground that the first marriage was valid by the English law, and in spite of the French decree. *Held*, that he is entitled to the decree. *Ogden v. Ogden*, [1908] P. 46.

For a discussion of this case in a lower court, see 20 HARV. L. REV. 412.

CONFLICT OF LAWS — PERSONAL JURISDICTION — NOTICE TO PRODUCE CORPORATION BOOKS FROM A FOREIGN JURISDICTION. — Pursuant to a statute, a foreign corporation doing business in Vermont was served in the state with a notice to produce before a local grand jury certain corporation

books which had been kept in Vermont but were at the main office of the company in another state. *Held*, that for failure to produce the books the company is guilty of contempt. *Consolidated Rendering Co. v. State of Vermont*, 207 U. S. 541. See NOTES, p. 354.

CONSTITUTIONAL LAW — CLASS LEGISLATION — LEGISLATION AFFECTING CORPORATIONS EXCLUSIVELY. — A state statute provided that on notice a corporation might be compelled to produce its books before a grand jury. *Held*, that the statute is not invalid as making an arbitrary classification. *Consolidated Rendering Co. v. Vermont*, 207 U. S. 541.

For a criticism of this view, see 20 HARV. L. REV. 634.

CONTEMPT — ACTS AND CONDUCT CONSTITUTING CONTEMPT — PUBLICATION OF INACCURATE REPORT OF COURT DECISION. — The respondent, a newspaper company, published an editorial in which it unintentionally misstated the conclusion reached by the Supreme Court of Rhode Island in a recent decision. *Held*, that the respondent is guilty of contempt. *In re Providence Journal Co.*, 68 Atl. 428 (R. I.).

Statutes in some states make it a contempt to publish "grossly inaccurate" reports of judicial proceedings. It has been suggested that such a statute is merely declaratory of the common law. See *In re Chadwick*, 109 Mich. 588. On the other hand, where a statute made such a report a contempt if published pending a suit, it has been held that, while the statute does not prevent punishment for any common law contempt, the publication of a "grossly inaccurate" account of a past trial is not such contempt. *Cheadle v. State*, 110 Ind. 301. Even if the respondent in the present case is guilty of a technical contempt, the propriety of the decision seems doubtful. The power to punish contempt is arbitrary, and consequently should not be exercised on slight pretext, but only when it is necessary for the due administration of justice. See *Atty.-Gen. v. Circuit Court*, 97 Wis. 1. In the present case it is difficult to see such a compelling necessity. Certainly in no prior case has a person been held in contempt solely because he has published an inaccurate report of judicial proceedings or decisions.

CORPORATIONS — DIRECTORS — DIRECTOR'S RIGHT TO SALARY WHEN QUALIFYING WITH SHARES HELD IN TRUST. — Corporation A purchased stock in corporation B and transferred it to X, a director of A, who made a declaration of trust in favor of A. X was thereafter elected a director in B, which required each director to be a shareholder. It appeared on the records of A that the stock transfer was made to enable X to become a director in B "to represent the interests of this company." *Held*, that the A company cannot recover the salary received by X from the B company. *In re Dover Coalfield Extension, Ltd.*, [1908] 1 Ch. 65.

This decision affirms the decision of the lower court commented on in 21 HARV. L. REV. 217.

CORPORATIONS — DISSOLUTION — CORPORATION DISSOLVED BY BANKRUPTCY. — The plaintiff brought an action for libel against a publishing company, which was adjudged a bankrupt before the suit came on for trial. *Held*, that the bankruptcy does not dissolve the corporation or bar the plaintiff's remedy. *Natl Surety Co. v. Medlock*, 58 S. E. 1131 (Ga.).

A libel is a "wilful and malicious injury" which is not released by the defendant's bankruptcy. *McDonald v. Brown*, 23 R. I. 546; BANKRUPTCY ACT OF 1898, § 17 (2). But the abatement of any action by or against a corporation is a necessary consequence of its termination. *Natl Bank v. Colby*, 21 Wall. (U. S.) 609. There is, however, a surprising dearth of authority on the effect of bankruptcy on the existence of corporations. Mere insolvency clearly does not work a dissolution. *Boston Glass Mfg. v. Langdon*, 24 Pick. (Mass.) 49; *Ready v. Smith*, 170 Mo. 163. Bankruptcy, however, according to one case, terminates the organization. *State Savings Ass'n v. Kellogg*, 52 Mo. 583. Cf. also *Chamberlin v. Huguenot Mfg. Co.*, 118 Mass. 532. It may be argued that

it is an implied condition of incorporation that bankruptcy shall revoke the charter. But it is not likely that state legislatures would make the existence of corporations, their own creations, depend upon federal proceedings. As has been suggested, the bankruptcy laws are aimed not at the life of the debtor, but solely at his assets. See *Holland v. Hayman*, 60 Ga. 174. Possession of assets is not requisite to a corporation's existence, hence the implication of dissolution is not based on necessity. There are, moreover, obvious advantages in the continuation of a corporation which is subject to liabilities. The decision of the present case, therefore, seems correct.

DAMAGES — MEASURE OF DAMAGES — INTEREST UPON DEMURRAGE. — *Held*, that interest is not recoverable upon demurrage awarded to a vessel for the time she was laid up for repairs after an injury by collision. *The Sitka*, 156 Fed. 427 (Dist. Ct., W. D. N. Y.).

When a vessel is detained for repairs after a collision the owner may recover full compensation in the nature of demurrage for the loss sustained by the detention. *The Potomac*, 105 U. S. 630. The law as to interest upon such demurrage is entirely unsettled. Of the few cases which give any consideration to the question the majority either allow it or leave it to the discretion of the jury. *The America*, 11 Blatchf. (U. S.) 485. On general principles, when a tort has deprived the plaintiff of property, interest is due on the claim from the date when the defendant should have reimbursed the plaintiff. *Clark v. Miller*, 54 N. Y. 528. Interest, therefore, is recoverable upon the cost of repairs from the time the bill became payable. *The Mahanoy*, 127 Fed. 773. But the date upon which the profits of a vessel would be receivable varies in every case and it is impossible to establish any general principle, as in the case of repairs. Although unscientific, it seems to work substantial justice to leave the question to the discretion of the jury with instructions to fully compensate the libellant for the detention. SPENCER, MARINE COLLISIONS, § 206.

DAMAGES — MEASURE OF DAMAGES — RECOVERY FOR SUBSIDENCE OF SOIL DUE TO WITHDRAWAL OF SUPPORT. — The plaintiffs sought compensation for damages to cotton mills resulting from subsidence caused by the past working of mines. *Held*, that the depreciation in selling value due to fear of further subsidence cannot be taken into account in estimating damages. *West Leigh Colliery Co. v. Tunnicliffe and Hampson*, [1908] A. C. 27.

It is well settled in England that the cause of action in cases of subsidence of the soil caused by working of mines is not the withdrawal of support, but the subsidence itself. See 13 HARV. L. REV. 665. The proper measure of damages in such cases is the depreciation in the market value of the premises due to the wrongful act of the defendant. *Hosking v. Phillips*, 3 Exch. 168. Damage to be caused by possible future subsidence cannot be taken into account in assessing damages for past subsidence, but all damage caused by a single subsidence must be claimed in a single action. *Darley Main Colliery Co. v. Mitchell*, 11 App. Cas. 127. To allow for present diminution of selling value of an estate arising from fear of further subsidence is, however, not open to the objection that it allows present damages for a future cause of action. But the present decision may well be supported on the ground that such damage is only remotely, and not in a legal sense, caused by the subsidence and is in fact due to the removal of support, which, though it is a present cause, is not a wrongful act. *Rust v. Victoria Graving Dock Co.*, 36 Ch. D. 113.

DEDICATION — RESTRICTIONS ON DEDICATION — RESTRICTIONS IMPOSED BY DEDICATOR. — An owner dedicated land to the public for use as a street on the conditions that it should be graded, and that the abutting property owners should be free from assessment therefor or for other street improvements. The defendant municipality accepted it on behalf of the public subject to these conditions. It graded the street and assessed the abutting property owners for the cost. The plaintiff brought a writ of *certiorari* to test the validity of the assessment. *Held*, that the assessment be set aside. *Perth Amboy Trust Co. v. Perth Amboy*, 68 Atl. 84 (N. J., Sup. Ct.). See NOTES, p. 356.

EASEMENTS — EXTINGUISHMENT — UNITY OF POSSESSION. — After the tenant for years in possession of the dominant estate had brought suit for an obstruction of the easement of light, the owner of that estate conveyed his reversion in fee to the owner of the servient. The term had not yet expired. *Held*, that the tenant can recover, as unity of possession is necessary to extinguish the easement. *Richardson v. Graham*, [1908] 1 K. B. 39. See NOTES, p. 359.

EMINENT DOMAIN — COMPENSATION — SET-OFF OF BENEFITS CONFERRED ON LAND REMAINING TO OWNER. — C. 16 of the Greater New York charter provided that the dock commissioner might by eminent domain acquire land necessary for the improvement of the water-front, and § 822 provided that where part only of a single tract is taken the compensation to the owner should be the difference between the value of the entire tract and the value of the premises in the condition in which they will be after the part is taken. *Held*, that § 822 violates the constitutional provision that private property shall not be taken for public use without just compensation. *Matter of City of New York*, 190 N. Y. 350.

There is a settled conflict of authority as to whether benefits to the remaining land may be set off against the value of the part taken. See *Bauman v. Ross*, 167 U. S. 548; 12 HARV. L. REV. 505. It has heretofore been generally supposed that New York allowed such a set-off. See *Bauman v. Ross*, *supra*; *Rexford v. Knight*, 15 Barb. (N. Y.) 627. The principal case settles the law in New York and clearly holds that an award shall in no case be made for less than the value of the property actually taken by condemnation. It is to be noted, however, that this case does not overrule the class of cases in which it has been held that a tax or an assessment for local improvement may be set off against an award for property condemned. *Genet v. City of Brooklyn*, 99 N. Y. 296.

EQUITY — JURISDICTION — JURISDICTION BY CONSENT OR ESTOPPEL. — The defendant received \$3000 under an arrangement by which he was to pay \$1200 to the plaintiff, who brought an action of *assumpsit* for his share. By agreement the cause was transferred to the chancery side of the docket. The defendant thereupon demurred on the ground that the plaintiff had an adequate remedy at law. *Held*, that equity may take jurisdiction of the cause and that the defendant is estopped from questioning its jurisdiction. *Darst v. Kirk*, 82 N. E. 862 (Ill.).

Consent or estoppel cannot ordinarily extend a court's powers. *Klingelhoef v. Smith*, 171 Mo. 455. The jurisdiction of equity, although not so exactly defined as that of courts of law, is restricted, in general, to cases where there is no adequate legal remedy. *Bushnell v. Avery*, 121 Mass. 148; but see *Mellen v. Moline Works*, 131 U. S. 352. Both at law and in equity, however, a party may waive his right to object to the court's lack of authority over his person by mere failure to exercise it. *Burnley v. Cook*, 13 Tex. 586. This decision goes further in permitting the parties to extend equity's jurisdiction to a suit in which there is an ample remedy at law. Consent to the jurisdiction, however, is stronger than a waiver by failure to object, since allowing the agreement to be recalled is in itself inequitable. The present case is not alone in allowing equity to proceed after such a waiver or estoppel. *Champion v. Grand Rapids, etc., Ry.*, 145 Mich. 676; *Mertens v. Roche*, 39 N. Y. App. Div. 398. But in cases of this type equity is not bound to take jurisdiction, and does so at the court's discretion. *Hoagland v. Supreme Council*, 70 N. J. Eq. 607. The adoption of this principle of extending jurisdiction by consent illustrates the tendency to merge the two systems of law and equity.

FRANCHISES — POWER TO REVOKE INDIRECTLY BY GRANTING COMPETING FRANCHISE. — The defendant, under a permit from the proper authorities, built a highway bridge which diverted the travel from an ancient ferry owned by the plaintiff. *Held*, that an injunction will not issue. *Dibden v. Skirrow*, [1908] 1 Ch. 41.

The right to maintain a ferry can be acquired only by grant from the sovereign or by prescription, and such a right is ordinarily to be construed with great strictness against the claimant. *Charles River Bridge v. Warren Bridge*, 11 Pet. (U. S.) 420. Formerly ferry franchises, however acquired, were held to be exclusive in their nature. See *Hussey v. Field*, 2 C. M. & R. 432, 440. Still the franchise did not include all modes of transportation, for the ferry owner himself could not establish a bridge. See *Payne v. Partridge*, 1 Salk. 12. Hence it is doubtful if even under the early law a ferry franchise would have been infringed by the grant of a bridge franchise. The later authorities, however, so modify the law that unless the franchise is expressly made exclusive, the sovereign does not lose his right to grant a competing ferry. *Guen v. Ivy*, 45 Fla. 338; *Power v. Athens*, 99 N. Y. 592. Moreover, a bridge franchise is not infringed by the grant of a ferry privilege. *Parrott v. City of Lawrence*, 2 Dill. (U. S. C. C.) 332. No reasonable ground appears for distinguishing that case from one where the ferry is first acquired. The present case, therefore, seems correct on principle, and it is supported by the reasoning of a previous English decision. See *Hopkins v. Railway*, 2 Q. B. D. 224.

GENERAL AVERAGE — NATURE, CAUSE, AND MANNER OF SACRIFICE — EFFECT OF INHERENT VICE OF CARGO UPON THE RIGHT TO CONTRIBUTION. — Y & Co. shipped coal upon G & Co.'s vessel. The cargo ignited by spontaneous combustion, whereupon water was poured into the hold, damaging the unburned coal. In respect to this damage, Y & Co. claimed a general average contribution from G & Co. Held, that, in the absence of negligence on their part, Y & Co. are entitled to contribution. *Greenshields, Cowie & Co. v. Stephens & Sons*, [1908] 1 K. B. 51.

Apparently no case decides the shipper's right to contribution in general average where the condition of his goods produced the danger and he was guilty of no negligence. See CARVER, CARRIAGE BY SEA, 4 ed., 443. Formerly, where a sacrifice was necessitated by the negligence of one party to a maritime venture, he could not claim contribution from the other interests. *Schloss v. Heriot*, 14 C. B. (N. S.) 59; *Snow v. Perkins*, 39 Fed. 334. It is only equitable that he who caused the damage should bear the burden. See *Strang v. Scott*, 14 App. Cas. 601, 608; *Pacific Mail S. S. Co. v. N. Y. H. & R. Min. Co.*, 74 Fed. 564, 567. Nevertheless, recent English decisions allow contribution to a party free from cross-liability, whether negligent or not. *Milburn & Co. v. Jamaica, etc., Co.*, [1900] 2 Q. B. 540. By this test the shipper loses contribution because of defects in his goods only where the "inherent vice" is actionable. Another exception to the general right of contribution occurs where a deck cargo is jettisoned, such cargo being held a menace to the common interests of the venture. In the absence of special custom, the innocent owner thereof cannot claim contribution from co-shippers ignorant of the deck shipment. See *Strang v. Scott*, *supra*. A similar rule might well be applied to below-deck shipments of goods inherently dangerous, but an ordinary commodity like coal can hardly be so considered.

ILLEGAL CONTRACTS — CONTRACTS AGAINST PUBLIC POLICY — PROMISE TO MARRY AFTER DEATH OF EXISTING WIFE. — The plaintiff, knowing that the defendant had a wife living, agreed to marry the defendant when his wife died. Held, that the contract is void as against public policy. *Spiers v. Hunt*, 24 T. L. R. 183 (Eng. K. B. Div., Dec. 12, 1907).

This decision follows the American authorities. For a discussion of a recent English case reaching an opposite result, see 21 HARV. L. REV. 58. The court distinguishes the present case on the ground that here the motive for the promise was illegal.

INFANTS — UNBORN CHILDREN — WHEN CHILD EN VENTRE SA MÈRE CONSIDERED BORN. — Legacies were left "to each of my great-nieces born previously to the date of this my will." Five months later a great-niece was born, and five months thereafter the testator died. Held, that the child was entitled to a legacy. *In re Salaman*, [1908] 1 Ch. 4. See NOTES, p. 360.

INSURANCE — ACCIDENT INSURANCE — REQUIREMENT OF IMMEDIATE NOTICE OF ACCIDENT IN EMPLOYER'S LIABILITY INSURANCE. — An employers' liability insurance policy required the insured to give immediate notice of an accident. A rule was posted in the office of the insured's stable-foreman requiring drivers to report all accidents immediately. The foreman, learning of an accident caused by one of the drivers, failed to report it. The insured's general manager gave immediate notice to the insurer when he learned of the accident one month later. *Held*, that the insured cannot recover because of failure to give immediate notice. *Woolverton v. Fidelity & Casualty Co.*, 190 N. Y. 41.

Failure to satisfy a requirement of immediate notice in an accident insurance contract is a bar to recovery. *Travellers' Ins. Co. v. Myers*, 62 Oh. St. 529. Such a requirement, of course, cannot be taken literally. It is satisfied by notice given with due diligence under all the circumstances and without unnecessary delay. *Ward v. Maryland Casualty Co.*, 71 N. H. 262. The insurer's duty in the present case is to exonerate the insured, and it is entitled to every facility for effecting an equitable settlement with the injured party. Since an immediate investigation of the facts is essential to an accurate determination of the existence and extent of liability, it is just to interpret the requirement as imposing upon the employer the duty not only of reporting accidents which have come to his personal attention, but of immediately discovering and reporting all accidents. Since this duty, by its nature, must be partially performed by agents, and the principal is responsible for the negligent performance of a delegated duty, the failure of the foreman to use due diligence in reporting the accident may be imputed to the insured, and the requirement of immediate notice is not satisfied. *Northwestern, etc., Co. v. Maryland Casualty Co.*, 86 Minn. 467; *contra*, *Mandell v. Fidelity & Casualty Co.*, 170 Mass. 173.

INTERSTATE COMMERCE — CONTROL BY CONGRESS — NATIONAL ARBITRATION ACT. — The Act of Congress of June 1, 1898, c. 370, § 10, 30 Stat. at L. 424, provided that any common carrier engaged in interstate commerce or any agent thereof who "shall threaten any employee with loss of employment or shall unjustly discriminate against any employee because of his membership" in a labor organization, "is hereby declared to be guilty of a misdemeanor." *Held*, that the statute is unconstitutional. *Adair v. United States*, U. S. Sup. Ct., Jan. 27, 1908.

The decision is primarily based on the ground that the statute, in interfering with freedom of contract, is an unwarranted invasion of the right to personal liberty and property guaranteed by the Fifth Amendment. The court further holds that the Act is not a regulation of commerce within the meaning of the Constitution, and distinguishes it from the Safety Appliance and Employers' Liability Acts. *Cf. Johnson v. Railroad*, 196 U. S. 1; *Employers' Liability Cases*, 207 U. S. 463. One dissenting justice declares that the purpose of the Act was to promote the freedom and safety of commerce by prevention of strikes, and was therefore within the power of Congress. The other is of opinion that such a limited interference with freedom of contract, when supported by public policy, is not prohibited by the Fifth Amendment. For a criticism of the Act as a regulation of commerce, see 20 HARV. L. REV. 499.

INTERSTATE COMMERCE — WHAT CONSTITUTES INTERSTATE COMMERCE — RULE OF ULTIMATE DESTINATION. — One A, wishing to go from X, in Arkansas, to Z, in Texas, tried to purchase a ticket from X to Y, in Arkansas, and then to purchase another ticket from Y to Z. *Held*, that his attempt to purchase a ticket to Y is a matter of intrastate commerce to which state rate regulations apply. *Kansas, etc., Ry. Co. v. Brooks*, 105 S. W. 93 (Ark.).

It is well settled that a common carrier, although only carrying goods intrastate, is engaged in interstate commerce if such goods are *in transitu* to another state. *The Daniel Ball*, 10 Wall. (U. S.) 557. By the better view the ultimate destination intended by the shipper is the test of its being an intrastate or interstate shipment. *Houston, etc., Co. v. Ins. Co.*, 89 Tex. 1; see

20 HARV. L. REV. 652. If the goods have been shipped *bona fide* to a consignee in another state, and are then re-shipped by the consignee to another point within the state, such re-shipment is not a continuation of the interstate shipment. *Gulf, etc., Ry. Co. v. Texas*, 204 U. S. 403. But where the intra-state shipment is a mere subterfuge to benefit *pro tanto* by the reduced rates required by the state, the shipment is interstate. *State v. Gulf, etc., Ry. Co.*, 44 S. W. 542 (Tex.). There seems no reason why the rule in regard to freight should not be equally applicable to passenger traffic. In the present case, since A's ultimate destination was undoubtedly without the state and his attempt to purchase a ticket to Y a mere pretext to secure the reduced fare, he should be considered an interstate passenger.

LIMITATION OF ACTIONS — OPERATION AND EFFECT OF BAR BY LIMITATION — EFFECT ON CO-TENANT UNDER DISABILITY. — An elevated railroad ran for the period of the statute of limitations in front of land owned by five tenants in common, one of whom was under a disability. On suit by their grantee the railroad claimed a right by prescription. *Held*, that the plaintiff can recover only one-fifth of the total injury caused by the defendant. *Taggart v. Manhattan Ry.*, 38 N. Y. L. J. 1222 (N. Y., Sup. Ct., Dec. 1907).

The ordinary easement subjects the servient tenement to the dominant in such a way that it must necessarily exist against all those seised. Therefore one tenant in common cannot grant or reserve an easement valid against the others, since they have done nothing to subject their interests to a new burden. *Marshall v. Trumbull*, 28 Conn. 183; see *Clark v. Parker*, 106 Mass. 554. Similarly no easement should ordinarily be acquired upon the termination of the statutory period of limitations, if one co-tenant is under a disability. See *Watkins v. Peck*, 13 N. H. 360, 376. In the case of adverse possession, however, since the substitution of the possessor for the tenants not under disabilities cannot affect the interest in the whole land, of the tenant under a disability, the claims of the former should be barred. See *Bryan v. Hinman*, 5 Day (Conn.) 211; 10 HARV. L. REV. 384. The plaintiff's claim in the present case is for damages only; for the defendant's right of eminent domain makes it impossible to prevent the ultimate acquisition of the easement. Such a claim is clearly severable and is properly barred as to four-fifths, since the fifth interest derived from the co-tenant who was under a disability is not prejudiced thereby.

MANDAMUS — ACTS SUBJECT TO MANDAMUS — STATE'S ATTORNEY COMPELLED TO BRING QUO WARRANTO. — An Illinois statute provided "that the state's attorney, either of his own motion or at the instance of a private individual, may petition the court for leave to file an information in the nature of a *quo warranto*" against any one who should usurp any public office or any office in a corporation. The relator presented to the state's attorney a petition for an information in the nature of a *quo warranto* against one Brand, and filed affidavits making out a *prima facie* case that Brand was unlawfully usurping an office in a private corporation of which the relator was a director. The state's attorney refused to sign and file the petition. *Held*, that *mandamus* lies to compel him to do so. *People ex rel. Raster v. Healy*, 82 N. E. 599 (Ill.).

It is a fundamental rule that *mandamus* will not lie to compel the performance of duties resting in the discretion of the officer charged therewith. *People v. Dental Examiners*, 110 Ill. 180. It has been held in several jurisdictions, however, that the courts will interfere by *mandamus* in cases where an official has abused his discretion. *State v. St. Louis Public Schools*, 134 Mo. 296. Generally, under statutes similar to that of Illinois, the courts will not compel a prosecuting attorney to bring *quo warranto* proceedings to oust a public officer. *People v. Atty.-Gen.*, 22 Barb. (N. Y.) 114. The present decision properly distinguishes between the discretion that may be exercised by the state's attorney in such cases and that which may be used when the writ is directed against an officer of a private corporation. In the former case public policy requires substantial discretion to prevent unnecessary interference with public officials. In the latter case, since action by the state's attorney in no way affects the interest of the public, it is an abuse of his discretion if he refuses to proceed when a *prima facie* case is presented to him.

MUNICIPAL CORPORATIONS — LEGISLATIVE CONTROL — PROVISION FOR ENACTMENT OF ORDINANCES. — A city charter provided that all ordinances must be read three times to the board of aldermen before final passage. An ordinance was twice read before the board as constituted, but the final reading took place before a board organized after election, one half of its members being newly elected. *Held*, that the ordinance is invalid. *Paterson, etc., R. R. Co. v. Mayor, etc., of Paterson*, 68 Atl. 76 (N. J.).

Statutes very generally provide that an ordinance shall be read three times before final enactment. By the better opinion such restriction in the city charter is mandatory, not directory, and unless it is waived in some manner provided by the charter, an ordinance passed without the required readings is invalid. *Swindell v. State*, 143 Ind. 153. The cases opposed consider the requirement a parliamentary rule open to modification or waiver by the council. *Aurora Water Co. v. City of Aurora*, 129 Mo. 540. The legislative intent inferable from this requirement is obviously that the readings shall take place before a council with membership unchanged by a general election. Analogy to other legislative bodies and the apparent purpose to prevent ill-considered legislation lead to this conclusion. It is true that for certain administrative purposes and in its general business the demand is clearly for a continuity of action unbroken by election and change of membership. *Booth v. Bayonne*, 56 N. J. L. 268. But for strictly legislative purposes the continuity of such a body is broken by a general election. Thus, the present decision seems sound on principle, though the other authorities found on this point give the opposite construction to the requirement. *Smith v. Columbus, etc., Ry.*, 8 Oh. N. P. 1; *McGraw v. Whitson*, 69 Ia. 348.

POLICE POWER — REGULATION OF PROPERTY AND USE THEREOF — SLEEPING-CAR BERTHS. — A statute provided that the upper berth when unoccupied should be closed if the occupant of the lower berth so requested. *Held*, that the statute is unconstitutional. *State v. Redmon*, 114 N. W. 137 (Wis.).

Unless a valid exercise of the police power, the statute in question seems an unconstitutional regulation of the use of property. The legislature is ordinarily the proper judge of the necessity for health or other police regulation, and only when there exists no possible justification for a legislative act can the courts declare it unconstitutional. *People v. Smith*, 108 Mich. 527. But a statute showing on its face that it has no reasonable connection with the permissible objects of protection under the police power is unconstitutional, although purporting to be based on that power. Acts which it is sought to justify thereunder must be beneficial to the public generally, and the means must be reasonably necessary for the accomplishment of the purpose. *Lawton v. Steele*, 152 U. S. 133. A statute allowing only one berth in a section might well be upheld, but the protection of the health of the community is clearly not the purpose of legislation affording the lower berth better ventilation only upon the double contingency of the upper berth being unsold and the occupant of the lower requesting that it be closed. *Cf. Chicago v. Netcher*, 183 Ill. 104.

SPECIFIC PERFORMANCE — DEFENSES — PENDING ACTION OF EJECTMENT. — A agreed to sell land to B, and B paid part of the purchase price. Before conveyance C brought ejectment against A. Then B filed a bill for specific performance. The court below decreed that A, if successful in the ejectment suit, should convey the land to B on payment of the balance of the purchase price within twenty days after termination of that suit. *Held*, that the decree is improper. *Rosenberg v. Haggerty*, 189 N. Y. 481.

The discretionary power of a court to grant or refuse specific performance of a contract must be exercised not arbitrarily or capriciously, but reasonably with a view to justice under the circumstances of the particular case. *Quinn v. Roath*, 37 Conn. 16. Since the court assumes that time is not of the essence of this contract, if a bill were brought after the termination of the ejectment suit, the court might grant specific performance, though several

years had elapsed. *Gunton v. Carroll*, 101 U. S. 426. Such a decree would be justifiable because the court would have before it all the facts which might render performance equitable or inequitable. In the present case, however, the court by its decree has bound both parties to carry out the contract at some indefinite future time. See LANGDELL, BRIEF SUR. EQ. JURISD., 46. Pending that time circumstances may intervene which would render performance an injustice to one or to both parties. See *Gotthelf v. Stranahan*, 138 N. Y. 345. From the nature of the case the court could not have these circumstances in mind. Consequently the principal case seems right in holding that the court cannot "suspend" a decree of specific performance over the parties.

TAXATION — PROPERTY SUBJECT TO TAXATION — PROCEEDS OF FEDERAL SALARY. — The defendant taxed the plaintiff's bank deposit, which consisted only of money received by the plaintiff as his salary as an officer in the United States Navy. *Held*, that the tax is constitutional. *Dyer v. City of Melrose*, 83 N. E. 6 (Mass.).

A state cannot impose an income tax on the interest on federal bonds. *Weston v. Charleston*, 2 Pet. (U. S.) 449. But it can tax as personal property checks drawn on a sub-treasury for the payment of interest on the same bonds. *Savings Society v. San Francisco*, 200 U. S. 310. It cannot tax land owned by the federal government, though not used for any public purpose. *Van Brocklin v. Tennessee*, 117 U. S. 151. But as soon as an individual has taken the necessary steps to acquire the land, he may be taxed thereon, though, until the patent is issued, the legal title remains in the United States. *Witherspoon v. Duncan*, 4 Wall. (U. S.) 210. The test given is whether the state taxation impairs the efficiency of a federal agency in performing its functions. See *Railroad Co. v. Penniston*, 18 Wall. (U. S.) 5. Applying this test, the decision in the present case seems correct. The state could not, it is true, have taxed the salary of the plaintiff as income. *Dobbins v. Commissioners of Erie County*, 16 Pet. (U. S.) 435. But a tax on the money after it has been paid to him in no sense lessens the remuneration of a federal agent. The money has lost all federal nature, and has become indistinguishable from any other personal property taxable by the state.

TAXATION — PROPERTY SUBJECT TO TAXATION — STATE TAX ON PROCEEDS OF SALE OF IMPORTS. — A foreign corporation was engaged in New York in the business of importing and selling goods in the original package. The proceeds of the sales, when in the form of cash, were temporarily deposited in New York banks, and when in the form of bills were held in New York for collection. The balance of the proceeds, after paying the customs duties on imports and other business expenses, were immediately remitted abroad. A tax was levied by the state on the cash on hand and in bank and on bills receivable, as capital employed by the corporation in business within the state. *Held*, that the tax was not invalid as a regulation of foreign commerce. *People v. Wells*, U. S. Sup. Ct., Jan. 6, 1908. See NOTES, p. 353.

TRADE-MARKS AND TRADE-NAMES — PROTECTION APART FROM STATUTE — SITUS OF PROPERTY RIGHT. — The plaintiffs had manufactured a liqueur which they sold under the trade-name "Chartreuse." This product was made in France, but was sold extensively in this country. The French government confiscated the property, and this trade-name was transferred to the defendant. The plaintiffs removed to another country and, continuing the sale of their goods in this country, marked as before, sought to restrain the defendants from selling their product in this country under the same name. *Held*, that the defendant be enjoined. *Baglin v. Cusenier Co.*, 156 Fed. 1016 (Circ. Ct., N. D. N. Y.). See NOTES, p. 361.

BOOKS AND PERIODICALS.

I. LEADING LEGAL ARTICLES.

THE EFFECT OF PRESUMPTION OF DEATH UPON MARKETABILITY OF TITLE TO REAL ESTATE. — It is an elementary rule of equity that an unwilling purchaser will not be forced to take a doubtful title. He cannot, however, demand a title absolutely free from suspicion, for in the nature of things a mathematically certain title is an impossibility.¹ The test is not whether the title is free from all doubt, but whether it is free from reasonable doubt.

An interesting phase of this subject is presented in cases where the state of the title depends on the death intestate and without issue of a person who has been absent and unheard of for a long time. In a recent article Mr. W. F. Meier has collected the authorities on this point.² *The Effect of Presumption of Death upon Marketability of Title to Real Estate*, 19 Green Bag 713 (December, 1907). From a review of the cases the author reaches the following conclusions: (1) "Mere absence from home without tidings . . . is not sufficient to render marketable the title to property in which the absent one, or his lawful issue, may have an interest. (2) Absence for a long period of years . . . coupled with corroborative evidence pointing to a strong probability of actual death, will remove the cloud sufficiently to allow the enforcement of specific performance. (3) The disappearance and absence of a person, unmarried, under such circumstances as to warrant a finding for specific performance, will also raise a presumption of death without marriage and without lawful issue."

The results reached by Mr. Meier seem sound. But when we accept them we are necessarily led to the further conclusion that the presumption of death as such has absolutely no effect on the marketability of title. As Mr. Meier says, "when a person has been absent from his home or residence, and has not been heard from by his friends and relatives for seven years, there arises a presumption of death." This presumption is rebuttable, but if no evidence is given for that purpose it must be sustained by the court or jury.³ If, then, "mere absence" for seven years when no evidence is offered to rebut the presumption of death is not enough to warrant the court in forcing title on a purchaser, it cannot be said that the presumption, as such, is given any effect. This fact is made still clearer when we require the absence, though long enough to raise the presumption of death, to be "coupled with corroborative evidence pointing to a strong probability of actual death."

Furthermore, in most of the cases of this kind in which the marketability of title comes in question the court must feel sure to a moral certainty, not only that the absent party is dead, but also that he has not made a will or married and left issue. If he was unmarried when last heard of, the legal presumption, corresponding to the presumption of death, is that he died without legal issue.⁴ Few of the cases expressly consider how either of the difficulties suggested should be met when they arise in the present connection. But it will be noted that in practically all the cases in which specific performance is decreed against the vendee, there are circumstances that tend strongly to show that the absentee died within a short time after his disappearance, and therefore the possibility of his having married and left issue is very remote.⁵ Similarly, the fact that no one has appeared claiming under a will of the decedent although many years have elapsed since he disappeared, coupled with the further fact that he probably

¹ See *Lyddall v. Weston*, 2 Atk. 19.

² See also Maupin, *Marketable Title*, 2 ed., 746 n.

³ *Biegler v. Supreme Council*, 57 Mo. App. 419.

⁴ *Shown v. McMackin*, 9 Lea (Tenn.) 601.

⁵ *Cambrelleng v. Purton*, 125 N. Y. 610; *Ferry v. Sampson*, 112 N. Y. 415; *Bowditch v. Jordan*, 131 Mass. 321.

died a short time after he was last heard of, is sufficient to convince the courts of intestacy. The result, then, seems to be that the courts in fact give no weight to either of the presumptions as such, but apply the general rule that the title must be free from reasonable doubt, and to this end they require that the circumstances be such as to show beyond a reasonable doubt that the absentee has died intestate and without legal issue.

TITLE BY DEVOLUTION OF POSSESSORY RIGHTS. — That much of the learning concerning the history and development of our laws of property and much of the speculation upon the nature of title and possession are not only of interest to the antiquarian and the philosopher but are of practical value to the modern lawyer, is well illustrated by a recent article. *Title by Devolution of Possessory Rights*, Anon., 17 Madras L. J. 297 (August, 1907). The article is a review of the principles involved in a recent Indian decision¹ in which it was held — apparently for the first time — that the heir of a disseisor cannot recover possession from a trespasser who enters upon the land after the death of the ancestor and before the entry of the heir. This decision the author believes to be erroneous and contrary to the fundamental principles of English law. "Possession," he says, "is protected not merely as a fact, . . . or as an imperfect title in the course of ripening into ownership by the operation of the law of prescription, but as a substantive right or interest by itself." The ancestor in the present case, therefore, acquired a substantive right in the land which gave to his heir, without any possession of his own, a right good against all the world except the true owner.

In this conclusion the learned author seems eminently sound. The protection afforded the possession of a disseisor, even against the true owner, was fundamental in our law and forms a large chapter in its history.² This protection applied both to land and to chattels,³ and we can find traces of it in the doctrines of discontinuance and descent cast.⁴ A possession that was so protected was not merely a physical fact but a recognized legal right. This point was still more noticeable in dealings between third persons and the disseisor; for the latter had a right transferable, devisable, giving dower and curtesy, and subject to execution and escheat.⁵ Furthermore, his title was good against all but the disseisee, and when that one outstanding right became extinguished absolute ownership resulted. Hence the common law doctrine was a doctrine of relative ownership. If A, B, and C successively take X's land, C may be said to be the owner, subject only to the outstanding rights of A, B, and X. When those outstanding rights are extinguished, C becomes the absolute owner.

Modern cases accord with this conception of possession and title. The adverse possessor can maintain ejectment against all but the disseisee or any one claiming under him.⁶ One who has adverse possession for ten years acquires such an interest that when the sovereign takes the land by eminent domain, his executors may require the land to be valued with a view to compensation.⁷ It may be urged that in these cases the law gives a remedy in the nature of a tort action for interference with possession and not a proprietary remedy. As the author points out, if this were true, the heritable or devisable character of a possessory right, as shown in history, would be an illusion. For if the heir has entered into possession, all redress can be secured on the strength of that possession and no question of the heritable character of such right would ever arise. Has the common law changed today? The American cases which hold that the statute of limitations will not run against successive

¹ *Shi Gopal v. Ayesha Begam*, [1906] I. L. R. 29 All 52.

² Pollock and Maitland, *History of English Law*, B. II, c. IV.

³ 3 HARV. L. REV. 23.

⁴ 4 L. Quar. Rev. 286.

⁵ 2 L. Quar. Rev. 481, 488.

⁶ *Asher v. Whitlock*, L. R. 1 Q. B. 1.

⁷ *Perry v. Clissold*, [1907] A. C. 73. See 20 HARV. L. REV. 563.

adverse holders unless there is privity by sale, descent, or devise¹ would seem to rest more soundly upon the heritable and devisable character of the possessory right than upon a continuity of the mere fact of possession by privity of transfer or devolution, for unless in such a transaction there is an exchange of rights as well as a physical exchange, the privity would seem immaterial. Moreover, in the case of a mere holding, the personal relation of the holder to the *res* is certainly not heritable.²

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- BANKRUPTCY LAW, THE MERITS AND DEMERITS OF THE. *George C. Holt*. 5 The Law 425.
- BOARD OF RAILWAY COMMISSIONERS FOR CANADA, THE WORK AND POWERS OF THE. *Robert C. Smith*. 20 Green Bag 30.
- CANADIAN CONSTITUTION, THE. *John S. Ewart*. Maintaining that Canada though in form a colony is in fact independent. 8 Colum. L. Rev. 27.
- CIVIL SERVICE LEGISLATION, CONSTITUTIONALITY OF. *Harold Harper*. 22 Pol. Sci. Quar. 630.
- COMMERCE, THE DEVELOPMENT OF THE FEDERAL POWER TO REGULATE. *Philoander C. Knox*. Contending that Congress cannot prohibit, for reasons unconnected with interstate commerce, the shipment of articles lawfully produced. 17 Yale L. J. 139.
- COMMON LAW, SHORT STUDIES IN THE. III. POSSESSION. *A. Inglis Clark*. Summarizing the elements of possession particularly with reference to criminal law. 5 Comm. L. Rev. 12.
- CONSTITUTION, THE ELASTICITY OF THE. *Ernest Bruncken*. Contending that the Constitution should be interpreted according to modern beliefs. 20 Green Bag 18.
- CONSTITUTIONAL ASPECT OF THE SENATORIAL DEBATE UPON THE RATE BILL, THE. *James Wallace Bryan*. A brief historical survey of railroad rate legislation and discussion in detail of the Hepburn-Dolliver Bill. 41 Am. L. Rev. 801.
- CORPORATIONS AND THE COMMERCE CLAUSE (Continued). *Smith W. Bennett*. Discussing the power of Congress to prevent state incorporation of interstate carriers. 35 Nat. Corp. Rep. 588.
- CORPORATE DIRECTOR, THE LIABILITY OF THE INACTIVE. *H. A. Cushing*. Maintaining that the standard of care imposed upon such directors does not sufficiently protect the investing public. 8 Colum. L. Rev. 18. See 19 HARV. L. REV. 613.
- DAMAGES IN THE PUBLICIZATION OF TURNPIKES. *Anon.* Discussing the proper method of valuation. 12 The Forum 67.
- DUE PROCESS OF LAW, CONCERNING UNCERTAINTY AND. *Theodore Schroeder*. Contending that we now enforce criminal statutes so uncertain in terms that the courts are forced to exercise legislative powers. 66 Cent. L. J. 2.
- EXECUTIVE AND LEGISLATIVE POWERS, VALIDITY OF STATUTES CONFERRING, ON COURTS AND JUDGES. *W. W. Thornton*. Digesting the cases. 66 Cent. L. J. 24. See 21 HARV. L. REV. 138.
- FEDERAL AND STATE CONSTITUTIONAL DOMAINS. *F. L. Stow*. Showing why the case of *McCulloch v. Maryland* does not apply in Australia. 5 Comm. L. Rev. 3. See 20 HARV. L. REV. 494.
- INSTRUMENTS, ALTERATION IN. *S. Vaidyanatha Iyer*. 6 Cal. L. J. 21n. See 7 HARV. L. REV. 1; 18 *ibid.* 105, 165.
- JUDGE-MADE LAW. *Anon.* Contesting the suggestion of Mr. Hornblower, 7 Colum. L. Rev. 453, that it is better not to codify the law. 35 Nat. Corp. Rep. 613.
- PRESUMPTION OF DEATH UPON MARKETABILITY OF TITLE TO REAL ESTATE, THE EFFECT OF. *W. F. Meier*. 19 Green Bag 713. See *supra*.
- PUBLIC PURPOSES FOR WHICH TAXATION IS JUSTIFIABLE. *Frederick N. Judson*. Showing the development and modern extension of the idea of what constitutes a public purpose. 17 Yale L. J. 162. See 21 HARV. L. REV. 276.
- RAILROAD VALUATION. *William Z. Ripley*. Discussing the methods of valuation in the light of modern legislation. 22 Pol. Sci. Quar. 577.
- ROMAN LAW AND MOHAMMEDAN JURISPRUDENCE. I, II. *Theodore P. Ion*. Comparing the two systems. 6 Mich. L. Rev. 44, 197.
- STATES, SUABILITY OF, BY INDIVIDUALS IN THE COURTS OF THE UNITED STATES. *Jacob Thieber*. Discussing how far state officers are suable. 41 Am. L. Rev. 845.

¹ *Sawyer v. Kendall*, 10 Cush. (Mass.) 241; *Jackson v. Leonard*, 9 Cow. (N. Y.) 653.

² 3 HARV. L. REV. 313, 315.

- TITLE BY DEVOLUTION OF POSSESSORY RIGHTS. *Anon.* 17 Madras L. J. 297. See *supra*.
- TRADE UNIONS, THE LEGAL STATUS OF, IN THE UNITED KINGDOM, WITH CONCLUSIONS APPLICABLE TO THE UNITED STATES. *Henry R. Seager.* Discussing both on authority and on principle the right to sue an unincorporated union. 22 Pol. Sci. Quar. 611.
- VENDOR AND PURCHASER. *Anon.* Maintaining that the vendor cannot sue before transfer is due for failure to pay advance instalments of the price. 27 Can. L. T. 725.

II. BOOK REVIEWS.

A SUPPLEMENT TO A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW. By John Henry Wigmore. Boston: Little, Brown and Company. 1907. pp. xiii, 459. 8vo.

In reviewing Wigmore on Evidence three years ago we said that use alone could be the final test of the value to the profession of such an original and monumental work (18 HARV. L. REV. 478). This test has already satisfied the profession of the permanent value of Professor Wigmore's work, which has become not merely the best but the only authority in general use in this country and in England. In our review of the original work we spoke of several valuable innovations in the art of law-book writing. This supplement is also such an innovation. The fact that in a little over three years two hundred and eighty-one large pages devoted almost entirely to notes should become necessary, shows the enormous importance of the subject and of the book, and indicates also the value of this new plan of issuing a supplementary volume to an original work.

In this supplement all the new cases during the last three years, amounting to about four thousand in number, and all the statutes passed in that time have been arranged in paragraphs under the original topic titles and with the original numbering. It is thus possible for one who is using Wigmore on Evidence, by a glance into the supplement, to add to the discussion contained in the original volumes all the new information which the author has to give as a result of later judicial discussion and legislative action.

Most of the matter in the supplement consists of additional notes. There are, however, in a few cases, new paragraphs added to the text. The longest and most important of these is section 2281a, entitled "Mode of Obtaining Immunity in Return for Self-Criminating Evidence." This section constitutes an addition of five pages to the former text. Another important new discussion is that upon the right to disprove the truth of a statement in a case where evidence has been offered simply to prove that the statement was made. This is new section 263. The point aroused great public interest when it was raised in the recent Thaw trial. The author's opinion is opposed to the ruling in the Thaw trial, although the weight of authority, as he states it, is very strongly against him.

In this supplement the author appears to have expressed his individual opinions with more force and freedom than he permitted himself in his original volumes. Compare, for instance, the picturesque language which he allows himself in commenting on recent decisions granting new trials for erroneous rulings on evidence—"The Saracenic invasion, led by Fanatic Technicality into the realms of Truth and Common Sense"—with his forceful but less imaginative language in section 21 of the first of the former volumes.

There is a new index, slightly longer than the earlier one, covering the four original volumes and the supplement.

J. H. B.

LAW: ITS ORIGIN, GROWTH, AND FUNCTION. By James Coolidge Carter. New York and London: G. P. Putnam's Sons. 1907. pp. vii, 355. 8vo.

This volume contains thirteen lectures, which were prepared in order to be

delivered at the Harvard Law School. Their author died before their delivery; but his executors, pursuant to his wish, have published his manuscript.

The author's purpose is to establish a philosophy of the law. What the law is and where it comes from, are questions really very nearly the same. Mr. Carter's answer is in no degree uncertain, technical, or obscure. Law is custom. It arose in custom and has never properly been anything else. It is the same whether you are a wood veddah of Ceylon, a South American Abipone, or a Justice of the United States Supreme Court. A contract is a raised expectation, and breach of contract is objectionable because it violates what man by custom has a right to expect. Judges are experts on custom. They do not make the law; they only declare it. The view that law is the command of a sovereign dictated to a cringing people, as well as the rule that "what the sovereign permits, he commands," is totally rejected.

Much of the book is filled with Mr. Carter's answers to the obvious objection to his view. What place has legislation if the law is only found and not made? There are several answers: first, that in well-ordered states the great body of legislation is on public, not private, law, merely directing the order of government in mechanical particulars; secondly, that it can profitably fix definite rules for the criminal law, where custom is slow; thirdly, that it is useful for settling differences between diverse customs or in changing conditions. In all these cases, Mr. Carter thinks, legislation follows custom, or, at least, does not trample on it. And when legislation has tried to disregard settled custom, he finds it is the legislation which has been disregarded by society, and custom which has been followed, *vide* the Statute of Uses, and its result of adding three words to conveyancing. The truth is, the question, What is law? has different answers according to the point of view. If one regards only that which is considered right by the majority of the inhabitants of the state and which has the sanction of long custom, then misdirected legislation is no part of the real law; it is only a flaw on the surface of it, which time will brush away. But if the point of view is more practical and considers what must be done to escape actual punishment, the question of fundamental verities disappears, and all acts of the legislature become of absorbing interest and are certainly the law. Mr. Carter calls legislation which goes in the face of custom, tyranny, and not law. This is really a matter of nomenclature. The importance of the book is its strong assertion and convincing proof that custom is the only basis of law; that law "is not the dictate of Force, but an emanation from Order."

Immediately after defining the proper function of legislation, Mr. Carter considers very carefully the application of his philosophy to the modern codes of private law. His conclusions follow inevitably from his philosophy. If law is custom and not command, efforts to make law by command must be futile unless they can succeed in framing commands in accord with customs which will arise to provide for new groupings of fact. No one has ever claimed for man sufficient omniscience to foresee what such customs will be, and no one but Bentham has openly advocated true adherence to an erroneous and incomplete code rather than a reliance on custom, however uncertain. Even if a code were limited to declaring the law in so far as it was settled—a limitation which Mr. David Dudley Field himself admitted to be necessary, though he failed to express it in his code—there would still be a need of human knowledge of such a standard that several advocates of codes in the ideal have doubted its existence. These difficulties are not mere phantoms of logic to be disregarded by the practical man. Mr. Carter points out how they have contributed to the partial or complete failure of all the most earnest attempts at codification—in Rome, in Prussia, in France, and in New York, Louisiana, and California.

It should be added that the reader of a book which deals with law, as this one does, almost entirely on its philosophical side, cannot fail to be especially interested when he realizes that the ideas he reads were those of the busiest lawyer in the busiest city of the United States. It is noteworthy that a man so truly practical could take time to consider deeply matters of philosophy.

D. M. M.

A TREATISE ON THE LAW OF CORPORATE BONDS AND MORTGAGES. By Leonard A. Jones. Indianapolis: The Bobbs-Merrill Co. 1907. pp. lxxvi, 849. 8vo.

The scope of this volume includes, among other topics, the power of corporations to mortgage their property and franchises, the form and construction of corporate mortgages, property covered by railroad mortgages, after-acquired property, the legal nature of rolling stock, mortgage bonds, interest coupons, mortgage trustees, remedies and jurisdiction for the enforcement of corporate securities, the rights and liabilities of a receiver, receiver's certificates, reorganization, and the rights of purchasers at foreclosure sales. This list of topics shows the importance of the volume, and also serves to remind the prospective reader that the subject has received its development almost wholly within the last fifty years. The volume is neither a mere digest nor a collection of judicial opinions, but is a real treatise, stating principles and reasons, and discussing concrete problems. As the author's previous volumes on Mortgages, Liens, and kindred subjects have been useful and popular, it is gratifying to be able to add that the present volume is worthy to be placed beside its predecessors.

E. W.

SAMUEL FREEMAN MILLER. By Charles Noble Gregory. Iowa Biographical Series. Iowa City: The State Historical Society of Iowa. 1907. pp. xvi, 217. 8vo.

Somewhat more than a third of this volume is devoted to biography and incidental notes and references. The remainder gives a list of Mr. Justice Miller's opinions delivered in the Supreme Court of the United States and a reprint of his addresses on "The Formation of the Constitution," "The Use and Value of Authorities," and "The Conflict between Socialism and Organized Society." As Mr. Justice Miller's manuscripts were destroyed, the biographer has been at a disadvantage; but he has made use of newspapers and the statements of Mr. Justice Miller's contemporaries, and the result, by reason of the biographer's diligence and fairness, is a volume that is unlikely to be superseded.

E. W.

DIE TUBERKULOSE nach ihren juristischen Beziehung in rechtsvergleichender Darstellung. By F. K. Neubecker. Leipzig: Georg Böhme. 1908. pp. 36. 8vo.

In this monograph, delivered as an address before the Sixth International Tuberculosis Conference held in Vienna in September, 1907, Dr. Neubecker, of the University of Berlin, draws from the European legal systems—Germanic, Romance, and Slavic—the principles of private law that appear to furnish a method of combating the spread of tuberculosis by reason of personal relations and business transactions. Such principles are: to allow actions in tort for negligent or intentional infection, extending the liability in this regard to third persons; to give liberal defenses for breaches of contract and rights to rescind contracts concerning infected property; in fine, to establish by private law the boycotting of tuberculous persons and infected property. The monograph is concise, but is thorough and very suggestive. Of special interest in view of possible American anti-tuberculosis laws are the references to the Danish Tuberculosis Law of 1905.

MANUAL OF THE LAW OF EVIDENCE. By Sidney L. Phipson. London: Stevens and Haynes. 1908. pp. xviii, 208. 8vo.

This volume is stated on its title-page to be "for the use of students, being an abridgment of the fourth edition of the author's larger treatise upon the same subject." The arrangement of topics in the two books is the same, and the corresponding pages in the treatise are referred to in the manual. The treatise was reviewed in 21 HARV. L. REV. 157.

PROBLEMS OF INTERNATIONAL PRACTICE AND DIPLOMACY, with special reference to the Hague conferences and other international agreements. By Sir Thomas Barclay. London: Sweet and Maxwell, Ltd. Boston: The Boston Book Company. 1907. pp. xix, 383. 8vo.

This volume was prepared largely to suggest to departments of state for foreign affairs matters in which international agreement might be possible and certainly valuable, and to suggest also the form they might take. As proper subjects for such agreements it discusses Declarations of War; Floating Mines and Mine Fields; Immunity of Private Property at Sea; Limitation of Area of Visit and Search; Exclusion of Specific Areas from Hostilities; Contraband of War; Destruction of Prizes; International Prize Court; Blockades; and others. The book falls into three divisions: one devoted to comments on the problems selected for presentation; one to suggested draft treaties and clauses for international agreements in respect to those problems; and the third, to copies of conventions, treaties, acts, and recommendations heretofore made bearing on similar problems.

Though the second Hague Convention did not dispose of most of the problems considered by Sir Thomas Barclay, this book, which was privately issued and furnished to the delegates, must have been of assistance to them in their labors, and for the very reason that the problems were not disposed of, it will, without doubt, be of aid to them and to others in future considerations of the same problems. The book is fruitful in suggestion, and contains a convenient and valuable collection of documents and drafts made with scholarly discrimination and at the same time with an eye to utility.

S. H. E. F.

THE LAW OF CRIMES AND CRIMINAL PROCEDURE. By Lewis Hockheimer. Second Edition. Baltimore: The Baltimore Book Company. 1904. pp. 566. 8vo.

The author states, in some 475 pages of text, the principal doctrines of criminal law and procedure, with their qualifications and exceptions. While the first edition, published in 1889, was designed merely to state the criminal law of Maryland, the present edition, with its revised and much enlarged text and fuller citations, is a more general treatise. What distinguishes the book is its comprehensiveness. Besides the treatment of procedure, with an excellent collection of forms, we find chapters on constitutional restraints and special proceedings. In order to get this matter into one volume with the substantive law, the author has often been forced to sacrifice any real discussion of theory and even adequate delineation and presentation of the different divisions of the subject, as, for example, in the summary treatment of "Intent." Also in his effort to secure brevity — which has undoubtedly "necessitated a much greater degree of care than would have been required for a more discursive work" — the author has been led into some generalizations that can hardly be supported. The statement, for instance, that insanity, to furnish a defense, must have stood in the relation of cause and effect to the crime, is at least misleading; and the attempt to define "malice aforethought" in two sentences is bold and hardly justified by the degree of success attained.

In the main the book is a concise, well-ordered statement of the results of a large and fairly representative body of cases. While it in no way pretends to the authoritativeness of Bishop and will, as a text-book, hardly stand with May, which has rather fuller discussion and more careful statement, as a handy reference volume it has a very distinct value.

A. A. B.

A MANUAL OF PUBLIC INTERNATIONAL LAW. By Thomas Alfred Walker. Cambridge: At the University Press. New York: G. P. Putnam's Sons. 1895. pp. xxviii, 244. 8vo.

Mr. Walker's aim was to furnish for students and others who desired some definite knowledge of international law a "text-book which, while excluding

unnecessary details and mere theoretical discussion, might well serve as a fairly comprehensive general introduction to detailed study of the subject." He succeeded admirably. Most books on international law, unfortunately, have not been written from the point of view of the lawyer, — a fact which is one of the strong grounds for the belief in many quarters that international law is not true law. Mr. Walker's book, however, is a lawyer's book, and is noteworthy for the manner and extent to which it refers to decisions of the courts of Great Britain and of the United States. The book is brief and at the same time comprehensive.

But in considering the present-day value of a manual of international law written thirteen years ago, it must be remembered that in the last decade events which make and modify the law of nations have followed one another in rapid succession. In that time the Spanish-American War, the South African War, and the Russo-Japanese War have been fought; the Republic of Panama and the Republic of Cuba have entered the family of nations; two Hague Conferences have been held, and a permanent arbitration tribunal has been established at the Hague. The law as to recognition of independence, intervention, declarations of war, beginning of hostilities, rights of neutrals, and contraband — vitally affected by the events just named — has undergone important changes. If the modifications thus required were made in a new edition with the same care and skill that Mr. Walker used in the present manual, the new edition could be recommended heartily.

S. H. E. F.

COLLECTIVE OWNERSHIP, otherwise than by Corporation or by Means of the Trust. By C. T. Carr. Cambridge: At the University Press. New York: G. P. Putnam's Sons 1907. pp. xix, 118. 8vo.

The fact that this book is a Yorke Prize Essay will sufficiently inform the reader that it does not attempt to collect decisions for the benefit of the case hunter and hang them, as too often our American "text books" do, upon a frequently self-contradictory text. On the contrary the author has approached his task with philosophical methods, and squarely on a common law basis. The result is an admirable essay, very concisely dealing with the subject from analytical, expository, historical, and comparative points of view. Nor is the volume useful solely for its academic discussion. Though its size precludes a full treatise, the English lawyer may well find an answer in it to his question, and he will be aided in his search by a table of cases encouragingly long and by an index apparently excellent.

The author divides the cases that fall within the scope of the title into five classes: Man and Wife; Co-heirs; Joint Tenants; Tenants in Common; and Partners. There is also a useful chapter on the rights and remedies of co-owners *inter se*, and a final chapter on community ownership. The first topic, of Man and Wife, he treats in a comparative way, citing some very interesting German subtleties. He limits his discussion to Tenancy by Entireties, apparently for the reasons that the other topics that might have been dealt with are rather cases of successive than of collective ownership (a fact which may be open to some question), and that they would swell the work very greatly. To this subject of Tenancy by Entireties and to that of Joint Tenants — the most obscure of those he treats — the author devotes the larger relative amount of work.

In the chapter on Partners the discussion is practically limited to the support of the theory that partnership is a distinct variety of collective ownership, distinguished by the presence of agency, and not merely a subdivision of joint tenancy; and to the matter of the entity of the partnership — a subject on which we should have been glad to hear more. The first point seems sound, — for after all, classes are what we say they are, and, as is pointed out, the author's division is good, for partnership varies as much from the other forms under discussion as they do from one another. The more extended interest of the second point is lightly touched. In the last paragraph the author adopts "Professor Maitland's suggestion that it was a less extravagant fiction to call a

corporate group a person than to call an unincorporate group no person," and there is a suggestion on the preceding page that this fact is the true underlying explanation of the American *de facto* corporation law. It is the normal as well as the mercantile conception, that a group of peoples persistently acting together is an entity separate from the persons of those who compose it, which continues though they gradually change. This fact the law has generally, for defensive reasons, refused to recognize. When the elements of *de facto* organization are present, the reasons against its recognition are at a minimum. But recognition of a separate entity in that case would not necessarily imply the existence of limited liability — none exists in the mercantile view of a partnership, and it may fairly be said to be a privilege which only the sovereign may confer. It is not at all clear but that it is at just this point that the doctrine of *de facto* incorporation stops. True, one who contracts with such an association as a corporation may not sue its members personally. But that is as if it had expressly contracted not to so hold them, as is done in the case of trust associations. For torts the members of the group are liable. At this point is the limit which Professor Warren believes proper to the doctrine of *de facto* corporations. See 20 HARV. L. REV. 456.

A. R. G.

A TREATISE ON THE LAW OF NATURALIZATION OF THE UNITED STATES. By Frederick Van Dyne. Washington: Frederick Van Dyne. 1907. pp. xviii, 528. 8vo.

This work is at once a digest of the authorities and a manual of procedure. On the one hand it collects and classifies the constitutional provision, treaties, statutes, cases, and diplomatic rulings which make up the substantive law of the subject. On the other it covers the actual practice for both court and attorney. There is an adequate table of contents and subject index, but tables of statutes and of cases cited are lacking. Until it becomes obsolete the book will do for naturalization what the general digest should accomplish.

E. H. A., JR.

LEGAL ESSAYS. By James Bradley Thayer. Boston: The Boston Book Company. 1908. pp. xvi, 402. 8vo.

THE AMERICAN CONSTITUTION. By Frederick Jesup Stimson. New York: Charles Scribner's Sons. 1908. pp. 259. 8vo.

THE LAW AND THE CUSTOM OF THE CONSTITUTION. By Sir William R. Anson. In three volumes. Vol. II. The Crown. Part I. Third Edition. Oxford: At the Clarendon Press. London, New York, and Toronto: Henry Frowde. 1907. pp. xxvii, 283. 8vo.

COLONIAL LAWS AND COURTS. Edited by Alexander Wood Renton and George Grenville Phillimore. Reprinted from Burge's Commentaries on Colonial and Foreign Law. London: Sweet and Maxwell, Ltd. Boston: The Boston Book Company. 1907. pp. xxxi, 420. 8vo.

MANUAL OF THE LAW OF EVIDENCE. By Sidney L. Phipson. London: Stevens and Haynes. 1908. pp. xviii, 208. 8vo.

ON "SHORT SALES" OF SECURITIES THROUGH A STOCKBROKER. By Eliot Norton. New York: The John McBride Company. 1907. pp. 72. 8vo.

THE STUDENT'S LAW DICTIONARY. By S. S. Peloubet. Third Edition. New York: Peloubet and Hill. 1907. pp. 262. 8vo.

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COMMON LAW AND LEGISLATION.

NOT the least notable characteristics of American law today are the excessive output of legislation in all our jurisdictions and the indifference, if not contempt, with which that output is regarded by courts and lawyers. Text-writers who scrupulously gather up from every remote corner the most obsolete decisions and cite all of them, seldom cite any statutes except those landmarks which have become a part of our American common law, or, if they do refer to legislation, do so through the judicial decisions which apply it. The courts, likewise, incline to ignore important legislation; not merely deciding it to be declaratory, but sometimes assuming silently that it is declaratory without adducing any reasons, citing prior judicial decisions and making no mention of the statute.¹ In the same way, lawyers in the legislature often conceive it more expedient to make of a statute the barest outline, leaving details of the most vital importance to be filled in by judicial law-making.² It is fashionable to point out the deficiencies of legislation and to declare that there are things that legislators cannot do try how they will.³ It is fashionable to preach the

¹ See address of Amasa M. Eaton, Proceedings of Seventeenth Annual Conference of Commissioners on Uniform State Laws, 45.

² *E. g.*, the Sherman Anti-Trust Act, also Senator Knox's plan for an Employers' Liability Act.

³ For examples from the juristic literature of the past two years, see Carter, *Law, Its Origin, Growth and Function*, 3; Parker, *The Congestion of Law*, 29 *Rep. Am. Bar Ass'n*, 383; Parker, *Address as President of the Am. Bar Ass'n 1907*, 19 *Green Bag* 581; Dos Passos, *The American Lawyer*, 169; Hughes, *Datum Posts of Jurisp.*, 106; 2 Andrews, *Am. Law*, 2 ed., 1190.

superiority of judge-made law.¹ It may be well, however, for judges and lawyers to remember that there is coming to be a science of legislation and that modern statutes are not to be disposed of lightly as off-hand products of a crude desire to do something, but represent long and patient study by experts, careful consideration by conferences or congresses or associations, press discussions in which public opinion is focussed upon all important details, and hearings before legislative committees. It may be well to remember also that while bench and bar are never weary of pointing out the deficiencies of legislation, to others the deficiencies of judge-made law are no less apparent. To economists and sociologists, judicial attempts to force Benthamite conceptions of freedom of contract and common law conceptions of individualism upon the public of today are no less amusing—or even irritating—than legislative attempts to do away with or get away from these conceptions are to bench and bar. The nullifying of these legislative attempts is not regarded by lay scholars with the complacent satisfaction² with which lawyers are wont to speak of it. They do not hesitate to say that “the judicial mind has not kept pace with the strides of industrial development.”³ They express the opinion that “belated and anti-social” decisions have been a fruitful cause of strikes, industrial discord, and consequent lawlessness.⁴ They charge that “the attitude of the courts has been responsible for much of our political immorality.”⁵

¹ An excellent example may be seen in the Introduction (by Judge Baldwin) to *Two Centuries' Growth of American Law*.

² *E. g.*, a recent writer, assuming that certain common law doctrines as to procedure inhere in nature, points out that despite legislative attempts to get away from them, courts have preserved them. This is assumed to show that the legislature had attempted the impossible. 2 Andrews, *Am. Law*, §§ 646, 684. Of course, one might answer that there are jurisdictions where such legislation has been given effect by the courts. *Gartner v. Corwine*, 57 Oh. St. 246; *Rogers v. Duhart*, 97 Cal. 200. One might also say that if courts had been as zealous to enforce the spirit of the New York Code of 1848 as they were to graft common law upon it and to show that its leading ideas could not be carried out, the cases might tell another story.

³ Kelley, *Some Ethical Gains through Legislation*, 142. See also Seager, *Introduction to Economics*, § 236.

⁴ *Ibid.* 144, 156.

⁵ Smith, *Spirit of Am. Gov.*, c. xii. Professor Smith says: “By protecting the capitalist in the possession and enjoyment of privileges unwisely and even corruptly granted, they have greatly strengthened the motive for employing bribery and other corrupt means in securing the grant of special privileges. If the courts had all along held that any proof of fraud or corruption in obtaining a franchise or other legislative grant was sufficient to justify its revocation, the lobbyist, the bribe-giver and the ‘innocent purchaser’ of rights and privileges stolen from the people, would have found

There are two ways in which the courts impede or thwart social legislation demanded by the industrial conditions of today. The first is narrow and illiberal construction of constitutional provisions, state and federal. "Petty judicial interpretations," says Professor Thayer, "have always been, are now, and will always be, a very serious danger to the country."¹ The second is a narrow and illiberal attitude toward legislation conceded to be constitutional, regarding it as out of place in the legal system, as an alien element to be held down to the strictest limits and not to be applied beyond the requirements of its express language. The second is by no means so conspicuous as the first, but is not on that account the less unfortunate or the less dangerous. Let us see what this attitude is, how it arose, and why it exists in an industrial community and an age of legislation.

Four ways may be conceived of in which courts in such a legal system as ours might deal with a legislative innovation. (1) They might receive it fully into the body of the law as affording not only a rule to be applied but a principle from which to reason, and hold it, as a later and more direct expression of the general will, of superior authority to judge-made rules on the same general subject; and so reason from it by analogy in preference to them. (2) They might receive it fully into the body of the law to be reasoned from by analogy the same as any other rule of law, regarding it, however, as of equal or co-ordinate authority in this respect with judge-made rules upon the same general subject. (3) They might refuse to receive it fully into the body of the law and give effect to it directly only; refusing to reason from it by analogy but giving it, nevertheless, a liberal interpretation to cover the whole field it was intended to cover. (4) They might not only refuse to reason from it by analogy and apply it directly only, but also give to it a strict and narrow interpretation, holding it down rigidly to those cases which it covers expressly. The fourth hypothesis represents the orthodox common law attitude toward legislative innovations. Probably the third hypothesis, however, represents more nearly the attitude toward which we are tending. The second and first hypotheses doubtless appeal to the common law lawyer as absurd. He can hardly conceive that a rule of statutory origin may be treated as a permanent part of the general

the traffic in legislative favors a precarious and much less profitable mode of acquiring wealth." 329-330.

¹ Thayer, *Legal Essays*, 159.

body of the law. But it is submitted that the course of legal development upon which we have entered already must lead us to adopt the method of the second and eventually the method of the first hypothesis.

Strict or liberal interpretation of statutes is by no means the whole question. Even when statutes are not avowedly given a strict construction, as being in derogation of the common law, courts refuse to treat the rules established by legislation as parts of the law. They are conceded to be applicable to certain cases because the legislature clearly said so, but they are not conceived of as entering into the legal system as an organic whole. They are not regarded as at all co-ordinate with common law rules *in pari materia*. If any piece of legislation has become universal in common law jurisdictions, it is Lord Campbell's Act. That Act, too, has been in force long enough to have been thoroughly incorporated into the law. But the Supreme Court of the United States still thinks of it as introducing a sort of temporary innovation which is not at all to be thought of as on the same footing with common law doctrines.¹ And in the same spirit the Supreme Court of Missouri lays it down that while every physical interference with the person of another short of killing is presumptively wrongful and calls for justification, a killing is not presumptively wrongful but must be shown to have been wrongful by the party complaining, because it gave rise to no action at common law.² Strict construction is only a feature, therefore, although the most unfortunate feature, of the common law attitude toward legislation.

We are told commonly that three classes of statutes are to be construed strictly: penal statutes; statutes in derogation of common right; and statutes in derogation of the common law. An eminent authority has objected to all of these categories and has pointed out that all classes of statutes ought to be construed with a sole view of ascertaining and giving effect to the will of the law-maker.³ But there is more justification for some of these categories

¹ *Chambers v. B. & O. R. Co.*, 207 U. S. 142, 149.

² *Nichols v. Winfrey*, 79 Mo. 544. In the same way, if a statute makes a sale or a contract void upon grounds not declaratory of the common law, one who depends on that ground must plead it specially. *Finley v. Quirk*, 9 Minn. 194. But if what would otherwise be a contract is void at common law or because of an act declaratory of the common law, advantage of the defense may be taken under the general issue. *Oscan-yon v. Arms Co.*, 103 U. S. 261.

³ "The idea that an act may be strictly or liberally construed, without reference to the legislative intent, according as it is viewed either as a penal or a remedial statute,

than for others. For the rule that penal statutes are to be construed strictly something may be said. When acts are to be made penal and are to be visited with loss or impairment of life, liberty, or property, it may well be argued that political liberty requires clear and exact definition of the offense. So also the rule that statutes in derogation of common right are to be construed strictly has some excuse in England where there are no constitutional restrictions. There it is really another form of stating Blackstone's tenth rule, that interpretations which produce collaterally absurd or mischievous consequences are to be avoided.¹ In the United States it means that interpretations which would make an act unconstitutional are to be avoided, or else it is equivalent to Blackstone's tenth rule. Whenever it is applied beyond these limits, it is without excuse and is merely an incident of the general attitude of courts toward legislation. The proposition that statutes in derogation of the common law are to be construed strictly has no such justification. It assumes that legislation is something to be deprecated. As no statute of any consequence dealing with any relation of private law can be anything but in derogation of the common law, the social reformer and the legal reformer, under this doctrine, must always face the situation that the legislative act which represents the fruit of their labors will find no sympathy in those who apply it, will be construed strictly, and will be made to interfere with the *status quo* as little as possible. The New York Code of Civil Procedure of 1848 affords a conspicuous example of how completely this attitude on the part of courts may nullify legislative action.² Some regard this attitude toward legislation as a basic principle of jurisprudence.³ Others are content to make of

either as in derogation of the common law or as a beneficial innovation, is in its very nature delusive and fallacious." Sedgwick, *Construction of Const. and Stat. Law*, c. viii, *fin*.

¹ 1 Bl. Comm. 91.

² "You have the State of New York before you as a terrible example. I believe our practice today is infinitely more technical than that in New Jersey. Even the attempt to abolish forms of action and especially the attempt to abolish the distinction between law and equity practice have been dismal failures. The distinction between trover and assumpsit is today even more rigidly observed than under the common law practice. It is impossible to amend upon a trial from trover to assumpsit or *vice versa*." W. B. Hornblower, quoted in 2 Andrews, *Am. Law*, 2 ed., § 635, n. 29. But the impossibility of amendment spoken of and the rigid distinction were introduced into code practice by the judges in the teeth of express code provisions upon common law considerations. *De Graw v. Elmore*, 50 N. Y. 1. See N. Y. Code Civ. Proc. 1848, §§ 69, 173, 176.

³ Robinson, *Am. Jurisp.*, § 301.

it an ancient and fundamental principle of the common law.¹ In either event they agree in praising it as a wise and useful institution.² It is not difficult to show, however, that it is not necessary to and inherent in a legal system; that it is not an ancient and fundamental doctrine of the common law; that it had its origin in archaic notions of interpretation generally, now obsolete, and survived in its present form because of judicial jealousy of the reform movement; and that it is wholly inapplicable to and out of place in American law of today.

That the attitude of our courts toward legislation is not necessary to and inherent in a legal system is apparent when we turn to a great legal system in which it is wholly unknown. Not only is this view of legislation unknown to Roman law,³ but quite an opposite doctrine was established in Roman law countries even before they enacted codes.⁴ "Where a gap has been left by any statutory rule, it is filled up, according to this method, by reference to another rule, contained in the same statute, in connection with which a point left open in the first mentioned rule is expressly provided for, and the *ratio juris* of the last mentioned expression is taken to be a general rule of law applicable to all cases."⁵ In other words, statutes are taken to be parts of the law for all purposes. The courts reason from them by analogy the same as from any other legal rules.⁶

Legislation has not been regarded always as a mere supplement to or eking out of common law or customary law. On the contrary, an older view was that enacted law was the normal type, and customary law a mere makeshift to which men resorted for want of enactment to prevent a failure of justice. As Roman law after Justinian was a body of enactments, this idea is very prominent from the sixth century to the rise of the school at Bologna in the

¹ E. g., Carter, *Law, Its Origin, Growth and Function*, 308.

² Dr. Robinson says of the proposition that statutes in derogation of the common law are to be construed strictly that it is "a positive but reasonable rule." *Am. Jurisp.*, § 301. Mr. Carter says that judges "displayed their wisdom" by adopting it.

³ See, for example, *Digest*, I, 3, 12, I, 3, 13, and I, 3, 27.

⁴ *Dernburg, Pandekten*, I, § 35.

⁵ *Schuster, German Civil Law*, § 17.

⁶ *Salkowski, Institutionen*, § 5; *Windscheid, Pandekten*, 8 ed., §§ 20, 22. This is true also of the canon law. The canonist "did not mean to exclude from his common law all rules imposed by a legislator. Far from it. Before the middle of the thirteenth century the most practically important part of his common law was statute law, law published by a legislator in a comprehensive statute book." *Maitland, Canon Law in the Church of England*, 4.

twelfth. Whereas Gaius¹ wrote, "*constant autem jura . . . ex legibus*," etc., classing statutes as one form of law, we find that *lex* (statute) has become the living word and that enactment is felt to be the true law.² After the revival of legal studies in the twelfth century there were nearly five hundred years during which, in the empire at least, the *Corpus Juris*, as legislation of the emperor, Justinian, was supposed to be binding statute law.³ Hence written law or enactment was regarded as the type of law, and custom was said to be a certain kind of law which is taken for enactment when enactment is wanting.⁴ The title *De Legibus et Consuetudinibus*, borne both by Glanvill's treatise and by Bracton's, and the argument Glanvill feels compelled to make to show that England has laws although the rules administered by the king's judges are not enacted,⁵ make it evident that continental ideas as to the nature of law were taken for granted. Even after the theory on the Continent had changed, Hale shows the influence of the older notion in arguing that the rules of the common law had their origin in forgotten statutes.⁶ But the rise and development of a vigorous body of judge-made law in the king's courts and the feebleness and paucity of legislation from Edward II until Henry VIII, rendered such a theory wholly inapplicable to England; and the seventeenth century, which saw not a little vigorous legislation in England, saw also the end of the theory of statutory force of the *Corpus Juris* upon the Continent. As legislation was in point of fact a relatively unimportant element throughout the growing period of our legal system, it was natural that statutes should come to be regarded as furnishing rules for particular, definite situations, but not princi-

¹ Gaius, I, § 2.

² See the formulas of Isidore, 2 Bruns, *Fontes Iuris Romani Antiqui*, 83, adopted by Gratian, CC. 2-5, Dist. 1. See also the formulas in the *Expositio Terminorum* appended to *Petri Exceptiones* and in the related *Libellus de Verbis Legalibus*, Fitting, *Juristische Schriften des früheren Mittelalters*, 164, 181.

³ 2 Stintzing, *Geschichte der deutschen Rechtswissenschaft*, 165-188.

⁴ Thus Gratian, C. 5, Dist. 1. Of course I am speaking here of juristic theory. The facts were doubtless otherwise. See Jenks, *Law and Politics in the Middle Ages*, c. i.

⁵ Glanvill, Preface, Beale's edition, xxviii-xxix.

⁶ "And doubtless many of those Things that now obtain as Common Law had their Original by Parliamentary Acts or Constitutions . . . though those Acts are now either not extant or, if extant, were made before Time of Memory. . . . And were the rest of those Laws extant, probably the footsteps of the Original Institution of many more laws that now obtain merely as Common Law, or Customary Laws by immemorial Usage, would appear to have been at first Statute Laws or Acts of Parliament." Hale, *History of the Common Law*, c. i.

ples for cases not within their tenor, or from which to reason by analogy.¹ And the tendency to conceive of a statute as something exceptional and more or less foreign to the body of legal rules in which legislation had endeavored to insert it, which such a doctrine fostered, was furthered by the growth of an idea of limitations upon legislation which, through our doctrine of judicial power over unconstitutional legislation, has become very strong in America.

Independent of express constitutional limitations, there are five forms in which the courts have considered the question of limitations upon legislative power: (1) conflict of legislation with natural law; (2) interference of a temporal legislator in spiritual affairs; (3) attempts of Parliament to derogate from the royal prerogative prior to the Bill of Rights; (4) conflict of legislation with rules of international law; and (5) friction between the terms of a statute and the doctrines or principles of the common law. Each of the four first deserves attention in considering the last.

In the thirteenth century the Germanic principle, that the state was bound to act by law, coming in contact with the revived classical idea that the state exists of natural necessity for the general welfare, toward which law is but a means, so that the state creates law instead of merely recognizing it, led men to take up once more the distinction of natural law and positive law.² Positive law was the creature of the sovereign. But all sovereigns were subject to natural law, and their enactments in conflict therewith were simply void. This philosophical theory, made over so as to bring it into accord with theology, was given currency by Thomas Aquinas.³ Coke, in *Bonham's Case*,⁴ cites two cases of the reign of Edward III as deciding that an act of Parliament against common right and reason is void. As natural law "is called by them that be learned in the law of England the law of reason,"⁵ it might be supposed that these were early attempts to put the theologico-philosophical

¹ The phrase "common law" was borrowed from the canonists in the thirteenth century, meaning, both in its lay and in its ecclesiastical use, general, as opposed to local, law and custom. The use of "common law" in contrast to "statute law" is later, arising from the circumstance that statutes were rare. Maitland, *Canon Law in the Church of England*, 4.

² Gierke, *Political Theories of the Middle Age*, 73, 74.

³ *Summa Theologiae*, I, 2, q. 91, art. 2, and q. 93, art. 1.

⁴ 8 Reports 118 *a*.

⁵ Doctor and Student, Introduction. This follows Thomas Aquinas, who held that "that part of the eternal law which man's nature reveals is to be called natural law." *Summa Theologiae*, I, 2, q. 91, art. 1.

theory into practice. But it seems pretty clear that they will not bear the construction which Coke gave to them. In the first, *Tregor's Case*¹ (1334), Herle, J., said: "Some statutes are made against law and right, which when those who made them perceiving, would not put them in execution."² "Statutes made against law" looks very like statutes made against the law of nature. But the refusal of "those who made them" to execute them shows rather a sort of crude dispensing power, such as administrative officers exercise even today with respect to unpopular legislation. In the other,³ a case of 33 Edward III (1359), Coke tells us in *Bonham's Case* that the judges decided contrary to an express provision of the Statute of Westminster Second "because it would be against common right and reason." The statutory provision,⁴ however, does not seem to be express on the point decided, and one must feel that the explanation given in the Second Institute, namely, that "otherwise the act should be contrary to itself, which in all expositions is to be avoided,"⁵ is preferable. Fortescue (between 1453 and 1471) concedes the universal validity of natural law,⁶ and feels bound to demonstrate jury trial "*legi divino non repugnare*."⁷ In *Doctor and Student* (before 1563) it is laid down absolutely that "if any general custom were directly against the law of God, or if any statute were made directly against it, as, if it were ordained that no alms should be given for no necessity, the custom and statute were void."⁸ Two cases of the reign of Elizabeth are cited by Coke in *Bonham's Case* as holding void a statute of Edward VI⁹ because "it would be against common right and reason." But these cases evidently refused to apply a reservation in the statute according to its literal terms because of a mischievous and absurd result involved. In other words, the court applied Blackstone's tenth rule. The dicta in *Bonham's Case* that "when an act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it and adjudge such act to be void,"¹⁰ appear to be the first expositions of this theory in the reports. In *Finch's Law* (1636), however, it is set forth dogmatically: "Therefore Lawes

¹ Y. B., 8 Ed. III, 30.

² *Bonham's Case*, 8 Reports 108 a, 118 a.

³ *Fitzh. Abr.*, Cessavit, 42; *Fitzh.*, *Natura Brevium*, 209 F.

⁴ Stat. Westm. II, cap. 21.

⁵ 2 Inst. 402.

⁶ *De Laudibus Legum Angliae*, cap. 16.

⁷ *Ibid.* cap. 32.

⁸ *Dial.* I, c. 6.

⁹ 1 Edward VI, cap. 14.

¹⁰ 8 Reports 107 a, 118 a.

positive, which are directly contrary to the former [the law of reason] lose their force, and are no Lawes at all. As those which are contrary to the law of Nature. Such is that of the Egyptians, to turne women to merchandize and commonwealth affaires and men to keepe within dores." ¹ Lord Holt (1701) in *City of London v. Wood* ² approves the dicta in *Bonham's Case* and puts as an illustration that "an act of Parliament may not make adultery lawful." Finally, Blackstone (1765) begins by laying down the theory of natural law emphatically. He says: "This law of nature, being coeval with mankind, and dictated by God himself, is of course superior in obligation to any other . . . no human laws are of any validity if contrary to this." ³ But when he comes to apply it to legislation, he retracts. He cannot accept the dicta in *Bonham's Case* nor Lord Holt's approval thereof, but admits that "if the Parliament will positively enact a thing to be done which is unreasonable, I know of no power in the ordinary forms of the constitution to control it." ⁴ It has been shown that this change of view was a result of the revolution of 1688. ⁵ Since that event, courts "have no authority to act as regents over Parliament or to refuse to obey a statute because of its rigor." ⁶

Except as constitutional limitations are infringed, the same doctrine obtains in America. ⁷ But there are dicta that the superior obligation of the law of nature must be given effect, ⁸ and an eminent judge has declared that there are, apparently apart from constitutional restrictions, individual rights to which courts must give effect "beyond the control of the state." ⁹ The example which he gives, however, that "no court . . . would hesitate to declare void a statute which enacted that A and B who were husband and wife to each other should be so no longer, but that A should thereafter

¹ Finch, Law, B. I, c. 6.

² 12 Mod. 669, 687.

³ 1 Bl. Comm. 41.

⁴ 1 Bl. Comm. 91.

⁵ Coxe, *Judicial Power and Unconst. Legislation*, 179.

⁶ Willes, J., in *Lee v. Bude & T. J. R. Co.*, L. R. 6 C. P. 576, 582.

⁷ *Cooley*, Const. Lim., 200; *Bertholf v. O'Reilly*, 74 N. Y. 509; *Orr v. Quimby*, 54 N. H. 211.

⁸ *Jeffers v. Fair*, 33 Ga. 367; *Lanier v. Lanier*, 5 Heisk. (Tenn.) 572.

⁹ *Miller, J.*, in *Loan Ass'n v. Topeka*, 20 Wall. (U. S.) 655, 662. Cf. *Marshall, C. J.*, in *Fletcher v. Peck*, 6 Cranch (U. S.) 87: "The estate having passed into the hands of a purchaser for a valuable consideration without notice, the state of Georgia was restrained either by *general principles which are common to our free institutions* or by the particular provisions of the constitution of the United States from passing a law whereby the estate of the plaintiff in the premises so purchased could be constitutionally and legally impaired and rendered null and void."

be the husband of C, and B the wife of D," is viewed otherwise by Lord Holt in *City of London v. Wood*,¹ who says that Parliament "may make the wife of A to be the wife of B," though he agrees that there are natural law limitations on legislative authority. This striking example of the purely personal and arbitrary character of all natural law theories,² demonstrates the impossibility of maintaining any such doctrine as that laid down by Coke in *Bonham's Case*. But there are those who maintain today that there are extra-constitutional limitations upon legislative power,³ and some such feeling on the part of judges contributes not a little to the current attitude toward legislation.

Judicial limitations upon interference of the temporal legislator in spiritual affairs and upon attempts of Parliament to derogate from the royal prerogative prior to the establishment of the doctrine of parliamentary supremacy in 1688 have been discussed at length by Mr. Coxe.⁴ The decisions he sets forth are the parents of the American doctrine of judicial power over legislation. They show that prior to the Reformation a distinction between temporal and spiritual powers was recognized and unquestioned⁵ and that temporal legislation in purely spiritual matters was not binding on anyone because it dealt with matters over which the state had no power — it was *impertinent d'estre observé*.⁶ Of course the lay courts had no power over such matters either. The decisions in these cases proceed, not on any inherent quality in legislation, but upon a separation of powers similar to that provided for by American constitutions. So also in the matter of legislative interference with the royal prerogative prior to 1688. The courts were the king's courts, administering his justice in his name by his writs. So long as his prerogative existed, they were bound to give effect to it quite as much as they were to give effect to legislation.⁷ But the power of judging as to the validity of legislation to which these

¹ 12 Mod. 669.

² "Nous pensons, qu'à part le droit positif, il n'existe que des opinions d'auteurs, qui répondent plus ou moins aux besoins de la société." Antoine, *Introduction to Fiore, Nouveau Droit Internat. Public*, ii. Cf. Bentham, *Principles of Morals and Legislation*, 17, n. 1.

³ Hughes, *Datum Posit of Jurisp.* (1907), 106.

⁴ *Judicial Power over Unconst. Legislation*, 121-164, 165-171.

⁵ This distinction, recognized in the *Constitutions of Clarendon* and in *Magna Charta*, is stated very graphically in the *Sachsenspiegel*, B. I, art. 1.

⁶ Fitzh. Abr., *Annuity*, 41.

⁷ *Godden v. Hales, Show.* 475.

two situations gave rise contributed to produce the feeling that there is an indefinite, judicial, supervisory power over statutes.

International law stands to the law of each state in a relation quite analogous to that which the canon law occupied with respect to matters spiritual before the Reformation. It is a universal law, dealing with matters not of ordinary legal concern, although running into questions with which the local courts have to do so often and so closely that we hold it a common element of the municipal law of states. But in the same way the canon law, treating of matters which were not for the lay courts, at the same time found the lines between such matters and matters temporal hazy and difficult to draw, and may be said to have been to no less extent a common element in the municipal law of medieval Europe.¹ International law is in a sense a superior body of rules, not depending upon the will of any particular state, but imposed on all states, according to the theory one may adopt, by natural law or by the moral sentiment and public opinion of the civilized world. In the same way the canon law was a body of rules of superior authority, having behind it the sanctions of the church and of religion. But the separation of powers between national and international has not proceeded so far that courts are able to pronounce legislation contrary to the rules or principles of international law to be void or "impertinent to be observed." They have the power only to produce, so far as interpretation will allow, a harmony between the law of the state and the Law of Nations, just as lay courts formerly, without refusing to apply temporal legislation, "were willing to co-operate with the canonists in producing an harmonious result."² There are common law dicta that legislation cannot change a rule of international law.³ These appear to proceed upon the theory that international law is the law of nature applied to international relations and hence is of superior authority to positive law.⁴ To that extent, Lord Mansfield's dictum

¹ Maitland, *Canon Law in the Church of England*, cc. ii, iii, and iv.

² *Ibid.* 75.

³ In *Heathfield v. Chilton*, 4 Burr. 2015, Lord Mansfield said that Parliament not only did not intend to alter but "could not alter" the law of nations by stat. 7 Anne, c. 12. In *The Scotia*, 14 Wall. (U. S.) 170, Strong, J., said: "Undoubtedly no single nation can change the law of the sea. That law is of universal obligation, and no statute of one or two nations can change the law of the world."

⁴ "And as none of these states will allow a superiority in the other, therefore neither can dictate or prescribe the rules of this law to the rest; but such rules must necessarily result from those principles of natural justice in which the learned of every

may be the last echo in England of Coke's doctrine in *Bonham's Case*. The view which has prevailed, however, is that the courts are to prevent interference of legislation with international law by interpretation; that to avoid a conflict between international law and a statute, the courts will resort, if need be, to strained and forced constructions.¹ On the Continent, where different views of the relation of courts to legislation obtain, it is significant that instead of discussing the duty of interpreting statutes so as to accord with international law, as do English and American authors, text-writers consider the duty of states to *change* their laws so as to bring them into harmony with the just demands of other states.² In other words, conflict between municipal law and international law may be avoided in any of three ways: (1) by holding law and legislation of a state at variance with international law void; (2) by construing legislation in derogation of international law strictly and avoiding departure therefrom by interpretation; (3) by changing local laws whenever at variance with the received usages of nations. In the analogous case of the canon law, the courts, when the second mode was not open, adopted the first.³ Where international law is involved, with some suggestion that the first was admissible, they have come to take the second. Continental jurists adopt the third. It is evident that the case of statutes in derogation of international law is not analogous to that of statutes in derogation of the common law. In the former, we have two bodies of rules dealing with different relations which have a certain margin of contact. In the latter we have two forms of rules dealing with the same relations and making up one body of law; and the question is how they shall be adjusted to each other. If either may claim any superior authority, it is the legislative form, as the

nation agree; or they depend upon mutual compacts or treaties between the respective communities; in the construction of which there is also no judge to resort to but the law of nature and reason, being the only one in which all the contracting parties are equally conversant, and to which they are equally subject." 4 Bl. Comm. 66-67.

¹ *Le Louis*, 2 Dods. 210, 239; *The Charming Betsy*, 2 Cranch (U. S.) 64, 118. Hence if the statute leaves no room for interpretation, international law must give way. An interesting example may be seen in the Scotch case of *Mortensen v. Peters*, 14 Scots L. T. 227. See Gregory, *The Recent Controversy as to the British Jurisdiction over Foreign Fishermen more than Three Miles from Shore*, 1 Am. Pol. Sci. Rev. 410.

² 1 Fiore, *Nouveau Droit Internat. Public*, 351-354.

³ *Prior of Castle Acre's Case*, Y. B., 21 Hen. VII, 1. Lyndwood asserts expressly that a statute upon a matter of spiritual cognizance without the approval of the church is invalid. *Provinciale*, 1679 ed., 263, n. i. The judges seem to have agreed.

later and more direct expression of the general will. But if this false analogy has not assisted directly in keeping up the common law attitude toward legislation, the further example of judicially imposed limitations upon statutes has not been without effect.

With respect to each of the four cases we have been considering it may be noted that the legislator was attempting to act beyond his province or to derogate from rules of superior authority. Hence his mandates were "impertinent to be observed." In our fifth case, friction between the terms of a statute and doctrines or principles of the common law, the case is otherwise. Here the legislator is within his own undoubted province, and his rules have the superior authority. Hence the courts could not entertain a suggestion that legislation contrary to the doctrines of the common law is invalid. Granting its validity, they have to consider whether they will interpret it liberally, giving full and free development to its policy and spirit, or narrowly and strictly, refusing to suffer any suspension or modification of the existing judge-made law beyond what the letter of the enactment dictates. "A statute is said to be construed strictly when it is not extended to cover anything that is not clearly within its express terms."¹ Such is the construction which our courts have been exhorted to apply² and have said they would apply to statutory intruders.³ In other words, courts assume that legislatures are in the quiescent stage, as Dicey calls it,⁴ although that stage has never obtained in America. We have seen certain analogies that contribute to the attitude this false assumption is invoked to justify. It remains to see how the doctrine as to statutory innovations upon the common law arose and what has kept it alive.

Archaic interpretation, like any other feature of archaic law, is formal, rigid, and arbitrary.⁵ "In the barbarous stages of law,

¹ Terry, *Common Law*, 8.

² Carter, *Law, Its Origin, Growth and Function*, 308.

³ *E. g.*: "This statute is an innovation on the common law, and therefore will not be extended farther than is required by its letter." *Look v. Miller*, 3 Stew. & P. (Ala.) 13 (statute allowing a party to testify). "The courts will construe strictly laws in modification or derogation thereof, assuming that the legislature has in the terms used expressed all the change it intended to make in the old law, and will not by construction or intendment enlarge its operation." *Hollman v. Bennett*, 44 Miss. 322. Dr. Robinson cites this in 1900 as stating an elementary principle of American jurisprudence. *Elements of Am. Jurisp.*, § 301.

⁴ *Law and Public Opinion in England*, Lect. V.

⁵ "The oldest law of the Romans recognized no will as in existence other than the spoken will, the *dictum*. What is not spoken is not willed, and *vice versa* only that is

courts thwart the intention of parties to transactions by rules and restrictions which are not based on considerations of public advantage, but are formal, arbitrary, and often of a *quasi*-sacred character."¹ What Mr. Justice Holmes has styled "the inability of the seventeenth century common law to understand or accept a pleading that did not exclude every misinterpretation capable of occurring to an intelligence fired with a desire to pervert,"² is a characteristic phase of the archaic conception of all legal institutions and transactions. Applied generally to legislation of all kinds, it has left a monument in the elaborate elucidations of the obvious in the first three sections of the English Interpretation Act.³ Incarnate in a special, arbitrary rule of statutory construction, it has left a descendant in the doctrine we are considering. That rule is stated thus by Coke: "There is also a diversity between an act of Parliament in the *negative*, and in the *affirmative*; for an *affirmative* act doth not take away a custome, as the statutes of wills of 32 and 34 H. 8. doe not take away a custome to devise lands, as it hath beene often adjudged. Moreover there is a diversity between statutes that be in the negative; for if a statute in the negative be declarative of the ancient law, that is in affirmance of the common law, there aswell as a man may prescribe or alledge a custome against the common law, so a man may doe against such a statute; for as our author saith, *consuetudo etc. privat communem legem*. As the statute of *Magna Charta* provideth that no leet shall be holden but twice in the yeare, yet a man may prescribe to hold it oftener, and at other times; for that the statute is but in affirmance of the common law."⁴ It will be noted that there are two parts to this statement. The first is an arbitrary rule for construing a statute without regard to intent, according to the form in which the intent is expressed. The second is an equally arbitrary rule for determining whether an act declaratory of the common law precludes immemorial custom without regard to intent, according to the form

willed that is spoken. Therefore, in legal transactions the words take effect entirely independent of the intention they are to express. The *verba* are efficacious, not merely to the extent that they express the *voluntas*, but, for the law, their literal meaning stands for *voluntas* itself." 2 Danz, *Geschichte des Römischen Rechts*, § 142.

¹ Gray, *Restraints Alien.*, 2 ed., § 74 *b*.

² *Paraiso v. United States*, 207 U. S. 368, 372.

³ Thring, *Practical Legislation*, 109. For legislative attempts to provide against this type of interpretation in advance with respect to particular statutes, see 38 Hen. VIII, c. 7, § 28; 22 Car. II, c. 1, § 13; N. Y. Code Civ. Proc. 1848, § 1.

⁴ Co. Lit. 115 *a*.

of words used. Magna Charta, the example given, was expressly declaratory. Hence the form of expression, whether negative or affirmative, was not the criterion for determining the nature of the statute.

The first rule is very common in the books in the sixteenth and seventeenth centuries. Thus, in *Earl of Southampton's Case*,¹ Bromley, Serjeant, said: "If it be enacted by Parliament that the youngest son shall have appeal of the death of his father, that shall not exclude the eldest from his suit, because there are no words of restraint." In *Townsend's Case*,² Walpole, Catline, and Dyer argued to the same effect that "the words being spoken affirmatively here, may not obstruct the common law in its operation." Gerrard, Prideaux, and Dallison, *contra*, admitted the rule but said that the words used "making a new ordinance (although they are spoken affirmatively) contain in themselves a negative." The court took the latter view. In other words, the fact that the act was an innovation was a circumstance calling for a more liberal rule.³ This more liberal statement of the rule by admitting that there may be an implied negative is to be found also in the argument in *Stradling v. Morgan*,⁴ in *Elmes's Case*,⁵ and in *Jones v. Smith*.⁶

But the original, strict form of statement is to be found as late as 1695 in *Oldis v. Donmille*.⁷ And in 1760, in *Rex v. Moreley*,⁸ the stricter form of the rule reappears under very peculiar circumstances. The question arose upon a rule for a *certiorari* to remove certain orders under the Conventicle Act, with which Lord Mansfield evidently had very little sympathy. The statute⁹ provided that "no other court whatsoever shall intermeddle with any cause or causes of appeal upon this Act; but they shall be finally determined in the quarter sessions only." Also: "This act and all clauses therein shall be construed most largely and beneficially for the suppressing of conventicles, and for the justification and en-

¹ 1 Dyer 50 a.

² 1 Dyer 111.

³ Coke afterward stated the rule in this more liberal form with respect to statutes not declaratory: "A statute made in the affirmative without any negative *expressed or implied*, doth not take away the common law." 2 Inst. 200.

⁴ 1 Plowd. 199, 206.

⁵ 1 And. 71.

⁶ 2 Bulstr. 36.

⁷ Show. P. C. 58, 64. Here counsel say, *arguendo*: "Tis an affirmative Law and that seldom or never works any Change or Alteration in what was before."

⁸ 2 Burr. 1041.

⁹ 22 Car. II, c. 1, §§ 6, 13.

couragement of all persons to be employed in the execution thereof; and that no record, warrant or *mittimus* to be made by virtue of this act shall be reversed, avoided or in any manner impeached by reason of any default in form." The rule was opposed on the ground of these provisions. But, as the court pointed out, the *certiorari* would not try the merits but only the question whether the magistrates had exceeded their jurisdiction. It could be granted without allowing anything in the nature of a review and without passing on any "default of form." Hence the court directed that it issue. Counsel argued further, however, that "the general jurisdiction of this court is not taken away by mere negative words in an act of Parliament." To this the court assented, saying: "The jurisdiction of this court is not taken away unless there be express words to take it away." The statute here was so clear that if it was possible for legislation to take away the power of the court over a case by anything short of saying so in unequivocal terms, it surely had that effect. But on the rule for *certiorari* that was not the question. On the other hand, the rule in question was not universally conceded. In Lord Lovelace's Case¹ the question was whether a prescription to cut wood without view of the forester could be allowed. Coke's doctrine was cited, but the court refused to apply it. The report says: "And my Lord Richardson denied that difference taken by my lord Coke in Com. on Litt. fol. 115, as between negative statutes declaratorie of the common law and negative statutes introductory of a new law, and he held against my lord Coke that in neither of the cases a prescription can be against a negative statute." On the whole, we may say that in the sixteenth and seventeenth centuries there was an arbitrary rule of construction requiring negative words to take away the effect of immemorial custom or the operation of common law,² which, however, was not universally admitted and was construed more liberally by many who held that the negative might appear from the general tenor of the act without an express statement thereof; that the portion of the rule relating to declaratory statutes did not afford a criterion for determining when a statute is declaratory, but a mode of construing a statute otherwise shown

¹ W. Jones 270.

² This rule was not confined to conflicts between statute and common law. In *Bodwell v. Bodwell*, Cro. Car. 170, 172, Noy says, *arguendo*, "and a statute in the affirmative doth not take away a former statute, but they stand together." Here is a crude statement of the law as to repeal by implication.

to be of that character, and that the fact that a statute introduced an innovation was regarded by those who adhered to the rule as entitling it to more liberal construction. In the eighteenth century the rule is announced *obiter* in its stricter form. In the nineteenth century, these cases are cited for the doctrine that statutes are to be taken so far as possible to be declaratory of the common law, and hence, when in derogation thereof, are to be construed strictly.

Another class of old authorities is also cited today as supporting the doctrine in question; namely, those which construe together common law and statute upon the same general subject as rules *in pari materia*. For instance, Coke says: "The surest construction of a statute is by the rule and reason of the common law."¹ In other words, it should be construed so as to fit into the legal system of which it is a part. Statute and common law should be construed together, just as statute and statute must be. This is what the minority judges had in mind in the much-quoted passage in *Stowel v. Lord Zouch*.² Exactly the same arguments were made as to the necessity of construing one statute by another.³ It is apparent that these authorities do not require and are no warrant for a doctrine of judicial antipathy toward legislative innovation. The interpretation of these authorities as establishing a presumption of legislative intent not to interfere with the common law is a nineteenth-century one.⁴ Such a presumption may in fact have been perfectly justified in a period of rare and scanty legislation. It may have been assumed as a known fact that the legislature did not profess to make considerable and sweeping changes in the law. But that does not make of it and the courts did not then take it to be a conclusive presumption, established by law, which a period of legislative activity could not affect.

But one reported case in England prior to the nineteenth century lays down the doctrine as it is stated today. *Ash v. Abdy*⁵ was decided in 1678, but was not reported till 1819. It involved the question whether the Statute of Frauds was to be applied retroactively. The statute did not require any such con-

¹ Co. Lit. 272 b.

² 1 Plowd. 353. See *infra*, p. 401, n. 2. Cf. *Shipman v. Henbest*, 4 T. R. 109.

³ *Bodwell v. Bodwell*, Cro. Car. 170, 172.

⁴ It appears first in 1 Kent Comm. 464 (1826).

⁵ 3 Swanst. 664.

struction, and the ordinary criterion of the intrinsic merit of possible interpretations, or Blackstone's tenth rule, would suffice to justify the decision that it was not to be so applied. But Lord Nottingham is reported to have come to this conclusion "the rather because all acts which restrain the common law ought themselves to be restrained by exposition." It is curious that this dictum first saw light, nearly a century and a half after it was uttered, in the beginnings of the reform movement in England, when, in face of strong opposition from individual judges, Parliament was beginning to take a vigorous hand in making over the law. In this country the first announcement of it is in *Brown v. Barry*,¹ in 1797. A statute of 1789 had provided that the repeal of a repealing act should not revive the act repealed, and the point decided was that an act *suspending* a former act for a limited time was not a repealing act within this statute. In coming to this obvious conclusion, Ellsworth, C. J., said: "The act of 1789, being in derogation of the common law, is to be taken strictly." Nor does the doctrine appear in institutional writers till the nineteenth century. In Wood's *Institutes* (1722) the dicta in *Bonham's Case* are set out as a rule of construction, and it is laid down that "the surest construction is by the reason of the common law."² As we have seen, the latter statement meant, in the authorities from which it was taken, no more than that common law and statute *in pari materia* were to be construed together. Blackstone (1765) discusses interpretation of statutes at some length and sets out ten rules. He refuses to accept the dicta in *Bonham's Case* and makes no mention of statutes in derogation of the common law or of any rules with reference thereto. Kent (1826) says that statutes are to be construed with reference to the principles of the common law because it is not to be presumed "that the legislature intended to make any innovation upon the common law further than the case absolutely required,"³ and cites the argument of the minority judges in *Stowel v. Lord Zouch*. Finally in 1854 in *Bouvier's Institutes* we find it stated as a fundamental principle that "statutes in derogation of the common law

¹ 3 Dall. (U. S.) 365. The dictum in this case has been applied by the Supreme Court of the United States in *McCool v. Smith*, 1 Black (U. S.) 459, 490, and *Show v. Railroad Co.*, 101 U. S. 557, 565.

² Wood, *Inst.* 9, citing 2 *Inst.* 148, 301 *a.*

³ 1 *Comm.* 464. It should be remembered that Chancellor Kent had had some experience of democratic legislative activity, and was not at all in sympathy with it. *Memoirs and Letters of Chancellor Kent*, 178.

are to be strictly construed." ¹ From this time the tide of decisions and dicta runs steadily. The rule is now a part of the *fundamenta* of American law.² In other words this wise and ancient rule of the common law is, in substance, an American product of the nineteenth century. The English institutional writers of modern times, Broom, Stephen, and Campbell, are unaware of it.³ It does not appear in any institutional writer till 1854, and does not appear in any edition of Blackstone till 1870.⁴ With quite as much warrant one may cite as the true and ancient doctrine of the common law the classical statement in Heydon's Case,⁵ wherein a sound and liberal canon of construction was laid down for *all* statutes "be they penal or beneficial, restrictive or enlarging of the common law."

American courts, unrestrained by any doctrine of parliamentary supremacy, such as was established in England in 1688, found themselves opposed to legislatures, just as English courts of the sixteenth and seventeenth centuries had been opposed to the crown. They found in the books, over and above express constitutional limitations, vague doctrines of inherent limitations upon every form of law-making and of the intrinsic invalidity of certain laws. They soon wielded a conceded power over unconstitutional legislation. The great American institutional writer was an ardent federalist and had little faith in a popular legislature. The greatest of American judges, a man of like political sentiments, was not sure that "by general principles" legislatures were not bound to respect a *bona fide* purchaser for value as would a court of equity, and refuse to assert against him the rights of a defrauded people.⁶ Thus American courts were predisposed to look doubtfully upon legislative innovations. But the determining factor in the attitude of our courts toward legislation is doubtless to be found in the coincidence of a period of development through judicial decisions with one of great legislative activity. Usually legislative activity

¹ 1 Bouvier, Inst., § 88. Citing three cases: *Melody v. Reab*, 4 Mass. 471; *Gibson v. Jenney*, 15 Mass. 205; *Look v. Miller*, 3 Stew. & P. (Ala.) 13. The first of these deals with a penal statute. The second is a dictum. The third is a typical case.

² The American editors of Blackstone were slow in recognizing it. *Sharswood* (1859) added five to Blackstone's ten rules without mentioning this point. Its first appearance in this connection is in *Cooley's note to Blackstone's seventh rule*, 1 *Cooley's Blackstone*, 88, n. 1 (1870).

³ It is not mentioned in *Terry, Common Law* (1906).

⁴ See notes 1 and 2, *supra*.

⁵ 3 Reports 93.

⁶ *Fletcher v. Peck*, 6 Cranch (U. S.) 87.

has succeeded juristic or judicial activity. With us they happened to be coincident. Roughly speaking, the first century of American judicature was taken up with determining the applicability of the several doctrines of the common law to this country and working out the potential applications of common law principles to American conditions. Hence it was marked by fresh and living juristic thought and vigorous judicial law-making. For once, legislation had to contend with living and growing law of the discursive type instead of with the feeble offspring of a period of juristic decadence.

If, however, we should concede that an attitude of antipathy toward legislative innovation is a fundamental common law principle, we should have to inquire whether that principle is applicable to American conditions and is a part of our American common law. "The capital fact in the mechanism of modern states is the energy of legislatures."¹ American legislatures have been conspicuously active from the beginning. Moreover, our constitutional polity expressly contemplates a complete separation of legislative from judicial power. And this is in accord with the whole course of legal history.² Not only is a doctrine at variance with that polity inapplicable to American conditions, but if it ever was applicable, the reasons for it have ceased and it should be abandoned. For one thing, the political occasions for judicial interference with legislation have come to an end. In the sixteenth and seventeenth centuries the judiciary stood between the public and the crown. It protected the individual from the state when he required that protection. Today, when it assumes to stand between the legislature and the public and thus again to protect the individual from the state, it really stands between the public and what the public needs and desires, and protects individuals who need no protection against society which does need it. Hence the side of the courts is no longer the popular side. Moreover, courts are less and less competent to formulate rules for new relations which require regulation. They have the experience of the past. But they do not have the facts of the present. They have but one case before

¹ Maine, *Early History of Institutions*, Lect. xiii.

² "As the development of law goes on, the function of the judge is confined within ever narrowing limits; the main source of modifications in legal relations comes to be more and more exclusively the legislature." Sidgwick, *Elements of Politics*, 2 ed., 203. This is well illustrated in Campbell, *Principles of English Law* (1907), in which more than half the references are to statutes.

them, to be decided upon the principles of the past, the equities of the one situation, and the prejudices which the individualism of common law institutional writers, the dogmas learned in a college course in economics, and habitual association with the business and professional class, must inevitably produce.¹ It is a sound instinct in the community that objects to the settlement of questions of the highest social import in private litigations between John Doe and Richard Roe. It is a sound instinct that objects to an agricultural view of industrial legislation.² Judicial law-making for sheer lack of means to get at the real situation, operates unjustly and inequitably in a complex social organization. One might find more than one illustration in the conflict between judicial decision and labor legislation. But Dicey has pointed out a striking example in the operation of the equitable doctrines of separate property prior to the married women's acts. "The daughters of the wealthy," he says, "were when married, protected under the rules of equity in the enjoyment of their separate property. The daughters of workmen possessed little property of their own. The one class was protected. The other would, it seemed, gain little from protection."³ Whether the state exists only to secure "the individualistic minimum of legal duty," or to interfere with the activities of sane adults along paternal or even socialistic lines in the interests of the community at large, legislative law-making must be the chief reliance of modern society.⁴

But it is objected that statutes "have no roots" and are "hastily and inconsiderately adopted";⁵ that they are crude and ill-adapted to the cases to which they are to be applied, and are unenforced and incapable of enforcement;⁶ and that they "breed litigation,"⁷ whereas, supposedly free from the foregoing defects, judge-made laws "rest on principles of right" and "are the slow fruit of long-fought controversies between opposing interests."⁸ Very little reflection is needed to show how ill-founded these oft-repeated state-

¹ "It is not to be expected from human nature that the few should be always attentive to the interests of the many." 4 Bl. Comm. 379. One must not forget that counsel on both sides belong to the same class and have had the same training as the judges.

² Kelley, *Some Ethical Gains through Legislation*, 142.

³ *Law and Public Opinion in England*, 382.

⁴ Sidgwick, *Elements of Politics*, 2 ed., 343-344.

⁵ Baldwin, *Introduction to Two Centuries' Growth of Am. Law*, 2.

⁶ Carter, *Law, Its Origin, Growth and Function*, 3.

⁷ Hornblower, *A Century of Judge-Made Law*, 7 Colum. L. Rev. 460.

⁸ *Two Centuries' Growth of Am. Law*, 2.

ments are in fact. Dicey has shown that the married women's acts had very deep roots in the equity doctrines as to separate property.¹ Can we say that homestead and exemption laws, mechanics' lien laws, bankruptcy laws, divorce laws, wills acts, statutes abolishing the common law disqualifications of witnesses, permitting accused persons to testify, and allowing appeals in criminal causes, had no roots? Do any judge-made doctrines rest more firmly upon principles of right than these statutes, or than Lord Campbell's Act or Lord St. Leonards' Act or the Negotiable Instruments Law? Do the refinements of equity and the ultra-ethical impossibilities which the chancellors imposed upon trustees have deeper roots or represent right and justice better than trustees' relief acts? Are any judicial decisions more deliberately worked out or more carefully adjusted to the circumstances to which they are to be applied than the draft acts proposed by the Conference of Commissioners on Uniform State Laws or the National Congress on Uniform Divorce Legislation? What court that passes upon industrial legislation is able or pretends to investigate conditions of manufacture, to visit factories and workshops and see them in operation, and to take the testimony of employers, employees, physicians, social workers, and economists as to the needs of workmen and of the public, as a legislative committee may and often does? ² Failures are not confined to legislative law-making. The fate of the fellow servant rule, of the doctrine of assumption of risk, and of the whole judge-made law of employers' liability, the Taff-Vale case in England,³ and the fate of judicial adjustment of water-rights in America⁴ should make lawyers more cautious in criticizing the legislature. Freaks of judicial law-making are abundant.⁵ Spendthrift trusts are

¹ Law and Opinion in England, 369-393.

² See Kelley, *Some Ethical Gains through Legislation*, 156.

³ [1901] A. C. 426. See 5-6 Edw. VII, c. 47, § 4.

⁴ See Long, *Irrigation*, §§ 95, 98.

⁵ It has been held that a verdict of guilty in the "fist" degree is of no effect, *Woolridge v. State*, 13 Tex. App. 443, and this decision has been deemed of enough importance to be published as a leading case, 44 Am. Rep. 708. Also that a verdict assessing punishment in the "state penty" is fatally defective. *Keeller v. State*, 4 Tex. App. 527. Also that a verdict of "guilty" is ineffectual. *Taylor v. State*, 5 Tex. App. 569; *Wilson v. State*, 12 Tex. App. 481; *Harwell v. State*, 22 Tex. App. 251. But a verdict of "guilty" or "guilty" or "guilty" is good. *Partain v. State*, 22 Tex. App. 100; *Currey v. State*, 7 Tex. App. 91; *Stepp v. State*, 31 Tex. Cr. R. 753. What would be said of legislation that required such absurdities? For some further instances, decisions upon future interests in land in almost any of our jurisdictions may be referred to. See *Zane, Determinable Fees*, 17 HARV. L. REV. 297, 306.

In Indiana the plaintiff was required by judicial decision to negative contributory

as out of line with right and justice as any statute-made institution ever was.¹ The Exchequer rule as to reversal for error in admission of evidence, our American judge-made law of instructions to juries, our practice of new trials on the slightest provocation, and our whole pitfall-bestrewn practice in appellate courts are warnings of the evil possibilities even of judicial law-making. In short, crudity and carelessness have too often characterized American law-making both legislative and judicial. They do not inhere necessarily in the one any more than in the other.

Formerly it was argued that common law was superior to legislation because it was customary and rested upon the consent of the governed.² Today we recognize that the so-called custom is a custom of judicial decision, not a custom of popular action. We recognize that legislation is the more truly democratic form of law-making. We see in legislation the more direct and accurate expression of the general will.³ We are told that law-making of the future will consist in putting the sanction of society on what has been worked out in the sociological laboratory.⁴ That courts cannot conduct such laboratories is self evident. Courts are fond of

negligence in his pleading. *Mt. Vernon v. Dusouchett*, 2 Ind. 586; *Railroad Co. v. Burton*, 139 Ind. 357. This had to be changed by statute. Burns, Annotated Stat., § 359 *a*. In *Edmiston v. Herpolsheimer*, 66 Neb. 94, it was held that presentment of a check through the clearing house was not presentment in a reasonable time. The legislature, in response to the demand of business men, changed the rule at its next session. See Reporter's note to case cited. Such instances might be multiplied indefinitely and are no less suggestive than the cases conventionally cited where statutes have failed of effect. Lists of overruled cases, moreover, are quite as long and quite as formidable as schedules of repealed statutes.

If the public refuse to obey statutes, it is no less true that juries systematically refuse to obey the rules of judge-made law laid down for their guidance in actions against carriers, against employers, and for personal injuries generally. See some statistics on this point in my paper, *The Need of a Sociological Jurisprudence*, 19 *Green Bag* 607. Judges have been known to lay down rules which were quite as unsuited to those who had to obey them as any statutes have been. To take remote and therefore non-controversial examples, see Petheram, *English Judges and Hindu Law*, 14 *L. Quar. Rev.* 392, 404, and 15 *L. Quar. Rev.* 173, 184; Petheram, *The Mohammedan Law of Wakf*, 13 *L. Quar. Rev.* 383; Andrews, *Connecticut Intestacy Law*, *Select Essays in Anglo-Am. Legal History*, 431, 446. It is instructive to note that the points made against the Judicial Committee of the Privy Council in the articles cited are made against our supreme courts today. Kelley, *Some Ethical Gains through Legislation*, 142-156.

¹ See Gray, *Restraints Alien.*, 2 ed., §§ 262-264.

² 1 *Wilson's Works*, Andrews' ed., 183 (written 1790).

³ Bosanquet, *Philosophical Theory of the State*, 120-123.

⁴ Ward, *Applied Sociology*, 338.

saying that they apply old principles to new situations.¹ But at times they must apply new principles to situations both old and new. The new principles are in legislation. The old principles are in common law. The former are as much to be respected and made effective as the latter — probably more so as our legislation improves. The public cannot be relied upon permanently to tolerate judicial obstruction or nullification of the social policies to which more and more it is compelled to be committed.

Roscoe Pound.

CHICAGO.

¹ *E. g., Rensselaer Glass Factory v. Reed*, 5 Cow. (N. Y.) 587, which has been quoted repeatedly.

THE TEST OF CONVERSION.

IS there any definite test of conversion, or must we agree with Baron Bramwell's observation,¹ that "after all no one can undertake to define what a conversion is"?

It needs little argument to show the value of a definite test. The difference in the measure of damages between trover on the one hand and trespass or case on the other is radical and has not been affected by any reform in procedure.

Most of the confusion which has occurred can be traced to two sources: one is the use by courts and text-writers of such equivocal and indefinite phrases as "act of dominion," "exercise of control," etc.; the other is the tendency of the courts to allow trover in cases where the amount of damages would be the same if trespass or case were brought, because of the total loss of the chattel.²

Originally the phrase in the declaration in trover, that "the defendant has disposed of the property and converted it to his own use,"³ meant exactly what it said, *vis.*, that the defendant intended to receive and did receive the full benefit of the chattel, thereby necessarily intending to deprive and depriving the plaintiff permanently of all his rights in it. It is now, of course, wholly unnecessary either that the defendant receive or intend to receive any benefit, the law having developed here as it did in deceit. Nor is it strictly necessary that the plaintiff be entirely deprived of his right in the property; it may be that the defendant would gladly return the chattel in good condition to the plaintiff, but a tender of it will not cure the tort, and in most jurisdictions will not even mitigate damages.⁴ Is it still necessary in order to constitute a conversion that the defendant intend to deprive the plaintiff entirely of his rights in it, or has this also become a legal fiction?

It perhaps ought to be remarked before going further that it seems to be well settled that there is no conversion without some physical act of intermeddling with the chattel, such as taking or transferring possession, detention, use, or preventing removal.

¹ *Burroughs v. Bayne*, 5 H. & N. 296.

² *Bramwell, B.*, in *Hiort v. Bott*, L. R. 9 Exch. 86.

³ *Chitty, Pleading*, 13 Am. ed., 836.

⁴ *Sedgwick, Damages*, 8 ed., 74.

For example, an auctioneer who merely makes the contract of sale without in any way interfering with the goods themselves is not liable in trover.¹ The troublesome question is, what more is necessary besides such physical interference? Must there be coupled with it the intent to deprive the plaintiff permanently of his rights in the chattel, or is something less sufficient?

In the vast majority of cases where trover has been allowed, this element of intent has been present. In all the cases where there has been a purported dealing with the title upon the assumption that the plaintiff has no right in the chattel, the defendant necessarily intends the natural consequences of his act, *vis.*, the entire deprivation of the plaintiff. If A, either for himself or for another, purports to sell or mortgage or pledge X's property to B, both A and B acting upon the assumption that the property is A's, the intent to deprive X permanently of his rights in the chattel is necessarily implied. Perhaps neither A nor B would have intended to deprive X of his property right if they had known of its existence, but mistake of title, even in good faith, is no excuse. So, where there has been an actual dealing with title, the defendant being a fraudulent vendee, or purchaser with notice from a fraudulent vendee; or where the defendant has intentionally destroyed or made an essential change in the nature or quality of the chattel; or where the defendant has levied judicial process upon the property; or where he has used or detained it after demand, denying that the plaintiff has any right to it, the intent to deprive permanently is apparent.

In all these cases it seems fair and in accord with common law principles for the plaintiff to be able to say to the defendant: "You have wrongfully intermeddled with my chattel intending to deprive me of my rights in it." If, however, there is no such intent, express or implied, is it just to compel the defendant to buy the chattel at a price to be fixed by a jury?

Trover has been generally allowed for misfeasances by a bailee, without any reference to this element of intent. One typical case is that of a bailee of a slave using the slave for a different purpose from that for which he was hired. Another is that of a bailee of a horse driving it beyond the place to which he was hired to go. It is significant that in most of these cases of misfeasance by a bailee, the property was accidentally destroyed during such wrong-

¹ Consolidated Co. v. Curtis, [1892] 1 Q. B. 495 (*semble*). See also Traylor v. Horrell, 4 Blackf. (Ind.) 317.

ful use or became a total loss later as the result of such use; hence, if the plaintiff had sued in case he would have recovered the same amount of damages, the law throwing upon the intermeddler the risk of accidental loss during such unlawful possession. In *Farkas v. Powell*,¹ where the question arose squarely, the court held that if the accident to the horse happened after the bailee was again acting within the terms of the bailment, he was not liable unless the extra drive caused the loss of the horse; that is, although the courts call it a conversion, the defendant seems to be held liable only when he would be liable if case were brought.

If we regard these "driving beyond" cases as conversion, at what time does the defendant become a converter? How far beyond must he drive — a mile, a rod, or a foot? If the bailee had no right to use the horse at all, any use by the bailee would be some evidence of the defendant's intention to deprive the plaintiff permanently of his rights; this would be still stronger if the defendant knew that the horse was unfit for use and that the plaintiff had expressly forbidden any use. But in the "driving beyond" cases the property is usually kept by the plaintiff for the purpose of hire, and it would seem that he is adequately protected by the law if he is given the value of the extra use and the defendant is held liable as insurer during such wrongful use. If merely driving beyond is really a conversion, then, whether anything happened to the animal or not, the plaintiff could compel the defendant to buy the horse. It would certainly startle most liverymen if they were told that any deviation by one who hired a rig gave the former a right to make the latter purchase the property; and yet this is the inevitable conclusion from calling it a conversion.

Though courts have often said that any wrongful use of a chattel is a conversion, the case of *Frome v. Dennis*² is inconsistent with this idea and right. There the defendant used a plow three days thinking that the man from whom he borrowed it was the owner, and returned it to him in good faith at the end of that time. He was held not liable in trover, though if there had been any purported dealing with title, his mistake as to ownership would not have excused him; nor would he have been excused thereby if the plaintiff had sued him in quasi-contract for the value of the wrongful use, or in case for the value of the chattel if it had been

¹ 86 Ga. 800.

² 45 N. J. L. 515.

accidentally destroyed during the three days. Of course, if the chattel were such that use would consume it or essentially alter it, there would be conversion by intentional destruction; such a case presents no difficulty.

If a bailee instead of wrongfully using the chattel attempts to return it to the bailor without authorization, the law properly throws upon him the risk of transportation. Trover has been allowed in these cases, but here, as in the "driving beyond" cases, an action on the case would usually bring about the same result, since in most of the cases the chattel has been entirely lost. It seems odd to call the defendant a converter here where, instead of intending to deprive the plaintiff of any right at all, he is attempting to restore the possession of the property to him.

Carriers and warehousemen have been held liable in trover for a mere misdelivery. These cases have been criticized, however, and Martin, B., said in *Crouch v. Great Northern Ry. Co.*:¹ "If the question of an action of trover against a carrier for misdelivery were to be considered now for the first time, the courts would probably hold that trover was not maintainable."

In the case of *England v. Cowley*,² where the defendant wrongfully refused to allow the plaintiff to remove goods out of a house during one night so that he might distrain the next day, leaving the plaintiff in the house in possession of the goods, it could hardly be denied that there was an exercise of dominion as the phrase is generally understood. But the majority of the court held that the defendant was not liable in trover, Bramwell, B., saying: "the truth is that in order to maintain trover a plaintiff who is left in possession of the goods must prove that his dominion over his property has been interfered with, not in some particular way, but altogether; that he has been entirely deprived of the use of it. It is not enough that a man should say that something shall not be done by plaintiff, he must say that nothing shall." It is difficult to see why the last sentence should be limited to cases where the plaintiff has been left in possession of the goods; being left in possession of goods in a guarded house is certainly not of so much importance as to require a different rule. In some cases trover has been allowed for wrongfully refusing to allow removal, and in many of them no doubt the intent to deprive the plaintiff of all his rights in the property probably existed and would have been found as a fact if submitted to

¹ 11 Exch. 742, 757.

² L. R. 8 Exch. 126.

a jury; but unfortunately the courts in their instructions to the jury have generally failed to direct such an inquiry.

In the comparatively recent case of *Hollins v. Fowler*¹ Lord Blackburn's dictum considerably qualified the act of dominion test. In that case he says: "It is generally laid down that any act which is an interference with the dominion and right of property of the plaintiff is a conversion, but this requires some qualification." He then lays down the following qualification: "On principle one who deals with goods at the request of the person who has the actual custody of them, in the *bona fide* belief that the custodier is the true owner or has the authority of the true owner, should be excused for what he does if the act is of such a nature as would be excused if done by the authority of the person in possession if he was a finder of the goods or intrusted with their custody." The result reached by such a rule is to be commended. But it may be pointed out that in the first place it is incomplete, as Lord Blackburn confesses in the next paragraph: "I do not mean to say that this is the extreme limit of the excuse, but it is a principle that will embrace most of the cases which have been suggested as difficulties." It is also to be observed that Lord Blackburn uses the word "excuse"; though he probably did not consider such cases as conversion at all, the language is liable to be considered as meaning excusable conversion. This is important on the question of the burden of proof. The phrase "should be excused for what he does" does not apply, of course, to an action on the case. The elaborate rule seems a cumbersome way of dealing with the question and brings about an unfortunate distinction between cases where mistake of title is and is not a good defense to a tortfeasor.

As long as all the cases in which trover has been allowed are considered as real conversions, it would seem to be impossible to frame any satisfactory definition. Many of the attempted definitions in the decisions and text-books give one almost no help. Cooley² defines conversion as "any distinct act of dominion wrongfully exerted over another's property in denial of his right or inconsistent with it." This phrase "act of dominion," which appears so

¹ L. R. 7 H. L. 757 (1875).

² Cooley, Torts, 3 ed., 859. For a similar definition, see 28 Am. & Eng. Encyc., 2 ed., 679. For some other definitions, see Bishop, Non-Contract Law, § 403 ("any dealing with a chattel which impliedly or by its terms excludes the dominion of the owner"). Pollock, Torts, 288 ("an unauthorized act of dominion which deprives another of his property permanently or for an indefinite time").

often in the cases and text-books, probably meant at one time something more than a mere intermeddling; but no one, apparently, has been able to tell exactly what that something was, and hence the phrase has come to mean nothing more than it necessarily means — an act of intermeddling or interference. The phrase “inconsistent with his right” adds nothing in the way of definition, because any trespass or other act of intermeddling is inconsistent with the right of the owner, otherwise it would not be a tort at all; but it seems to be well settled that a mere trespass is not a conversion.¹ The phrase “in denial of his right” is equivocal; does it mean “in denial of all the plaintiff’s rights” or “in denial of one or some of the plaintiff’s rights”? Whichever it was intended to mean, the alternative phrase “inconsistent with plaintiff’s right” makes it impossible to say that the definition really defines anything more than an intentional trespass or other act of intermeddling.

Clerk and Lindsell² say that a conversion takes place “when a person entitled to the possession of a chattel is permanently deprived of that possession.” The defect in this definition is that, as has been pointed out in the first part of this article, actual deprivation is not strictly necessary, because the defendant may be willing to restore the chattel, especially in cases where he has acted in good faith. The defect would seem to be all the more serious as a statement of English law, because the defendant has under some circumstances in England the right to return the chattel in mitigation of damages,³ though not by way of curing the tort. It would seem also that a definition ought to convey the meaning that the defendant must act intentionally, since trover does not lie for a negligent act.

Bigelow⁴ has defined conversion as “an act of dominion over the movables of another; that is, a usurpation of ownership.” This seems less objectionable than the others, if he means by “usurpation of ownership,” complete ownership. The difficulty is that it apparently does not cover those cases where the defendant has no intent to receive any benefit; for example, where the defendant knowingly assists in the purported transfer of title from one party to another.

¹ *Fouldes v. Willoughby*, 8 M. & W. 540.

² Clerk & Lindsell, *Torts*, 3 ed., 218.

³ *Fisher v. Price*, 3 Burr. 1363.

⁴ Bigelow, *Torts*, 8 ed., 395.

In a criticism in this REVIEW¹ of *Doolittle v. Shaw*,² in which case it was held that a mere driving beyond was not a conversion, the following definition was laid down: "an interference with plaintiff's possession or right to it, amounting to a complete denial for an appreciable time." Apparently this means an act of intermeddling which deprives the plaintiff of his possession or right to it for some time longer than a mere moment. No attempt is made to state how much longer. Surely such a serious liability as that of the defendant in trover ought not to depend upon such an uncertain test. No proper analogy can be drawn between interference for an appreciable time and the doctrine of substantial performance in contracts, because the latter phrase means almost a full performance; that is, there is a limit upward.

Upon principle it would seem that in order to constitute a conversion there ought to be coupled with the act of intermeddling the intent to deprive the plaintiff permanently of all his right in the chattel — an element which was present in the early history of the action. Except in those cases where this element of intent is obvious, as, for instance, in cases of purported dealing with title where it is necessarily implied, the question should be submitted to a jury just as any other doubtful question of issuable fact.

There is one class of cases which may occur to the learned reader as presenting difficulties under this proposed test. Suppose the defendant detains the chattel claiming only a limited interest in it, as, for example, that by agreement with the plaintiff he has a right to use it for a month, or that he has a lien on it, acknowledging otherwise the plaintiff's rights in the property. In the first place it is to be observed that unless the claim be made in good faith it would not necessarily negative the finding of the suggested element of intent. Intent here, as in other parts of the law, means the probable intent as gathered from all the circumstances. If, however, the claim be made in good faith, it would seem that the plaintiff is adequately protected by his action on the bailment, of replevin, or of case for intermeddling — the risk of loss devolving upon him even though he should be making the claim in good faith. It may also be pointed out that since even at common law a count in case and one in trover could be joined, the plaintiff, if he failed to prove the element of intent in the proposed test, could still recover in case and would not be thrown out of court. In

¹ 8 HARV. L. REV. 280.

² 192 Ia. 348.

those jurisdictions which have a more liberal rule as to joinder, or which have abolished the distinction between forms of action, the plaintiff would be at least equally if not better protected against such a contingency.

Though the plaintiff need only show, as establishing his right to sue, actual possession as bailee, finder, or trespasser, or right to immediate possession, he generally has the complete ownership of the property, which consists, as has been observed, of a bundle of rights. Can a logical line be drawn at any point between an intent to deprive of one of these rights and an intent to deprive of all the rights which the plaintiff may have? It would seem that it is no more possible than to draw a logical line at any point between intent to deprive permanently and intent to deprive for an instant of time.

The rule laid down by Lord Blackburn in *Hollins v. Fowler* seems to have been generally approved. Would it not be possible to take the further step of eliminating from the law of conversion the rest of the cases where there is no intent to deprive the plaintiff permanently of his rights? If the names *trover* and *conversion* are too firmly attached to these cases to be shaken loose by judicial decision, would it not be better to consider such cases as exceptions, not to be taken into account in defining conversion? If this step could be taken it would make the law of conversion logical, simple, and just.

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UNIFORMITY OF LAW IN THE SEVERAL STATES AS AN AMERICAN IDEAL.

I.—CASE LAW.

THE accumulation of case law and statutes in the United States has reached such proportions that it demands serious attention from all who are engaged in the study or the administration of the law. The Supreme Court of the United States and the courts of last resort in each of the forty-six states are producing annually volumes of new decisions which are binding precedents upon all inferior courts within their respective jurisdictions. In addition the national legislature and the legislature of each state are holding annual or biennial sessions and enacting new laws.¹ Every year it is becoming more difficult for lawyers and judges to keep up with the law. Judicial opinions written upon the plan often followed by Mr. Justice Gray, which were designed to exhibit the entire course of decision upon the subject in hand down to the date of the opinion, and of which conspicuous examples may be seen in *Hill v. Boston*,² *Ross v. Ross*,³ and *Hilton v. Guyot*,⁴ are becoming a sheer impossibility. As the precedents increase in number the judges of the highest courts under the pressure of business find it more and more difficult to examine carefully and cite the decisions of other jurisdictions. Whether the citation of outside authority has in fact diminished is a question which it would require much labor to answer with confidence, and upon which, in the absence of wide investigation, there is room for difference of opinion.⁵ The rapid increase of cases also presses hard upon the legal profession. A lawyer in full practice now finds it more and more dangerous to advise upon the law of any jurisdiction except his own. Teachers of law in the several states are perplexed by the multitude of pre-

¹ Alabama is the sole exception, the sessions of the legislature being quadrennial in that state.

² 122 Mass. 344.

³ 129 Mass. 243.

⁴ 159 U. S. 113.

⁵ See Report of the Committee on Law Reporting, 18 Rep. Am. Bar Ass'n, 343, and the valuable table annexed. Also see 2 Ill. L. Rev. 186, a note by Professor Roscoe Pound, and 21 HARV. L. REV. 119, note by Professor Wambaugh.

cedents and diversity of rules in deciding what is the proper course of study to lay before their students.¹

It is worthy of note that a similar condition exists in the British Empire. Professor Maitland said: "Standing at the beginning of a century and in the first year of Edward VII, thinking of the wide lands which call him king, thinking of our complex and loosely-knit British Commonwealth, we cannot look into the future without misgivings. If unity of law — such unity as there has been — disappears, much else that we treasure will disappear also, and (to speak frankly) unity of law is precarious. . . . The so-called common law of one colony will swerve from that of another, and both from that of England. Some colonies will have codes. If English lawyers do not read Australian reports (and they cannot read everything), Australian lawyers will not much longer read English reports."² Sir Edward Coke in the preface to the Third Part of his Reports estimated the number of volumes of Reports then in existence at fifteen.³ Lord Campbell says of Bayley, J., who flourished under George the Fourth, that "the whole common law of this realm he carried in his head, and in seven little red books. These accompanied him day and night, in these every reported case was regularly pasted, and in these, by a sort of magic, he could at all times instantaneously turn up the authorities required."⁴ The reported decisions of the Supreme Court of the United States and of the highest courts of Pennsylvania and Illinois each exceed two hundred volumes in number. The regular reports of the decisions of the highest court of New York have reached one hundred and ninety volumes, and those of the Supreme Judicial Court of Massachusetts one hundred and ninety-three volumes. No individual, however industrious or gifted, can hope to master more than a small part of this mass of matter, to say nothing of the statutes.

The language used by Sir Henry Maine in 1856, which then might have seemed exaggerated, is now well supported by the facts: "Hence that frightful accumulation of case law which conveys to English jurisprudence a menace of revolution far more serious than any popular murmurs, and which, if it does nothing

¹ See the interesting essay of Professor Kales, 21 HARV. L. REV. 92.

² English Law and the Renaissance, 33-34. Reprinted in 1 Select Essays in Anglo-Am. Legal History, 168.

³ Pollock, First Book of Jurisp., 294.

⁴ 3 Lives of Chief Justices, 291. See also Foss, 9 Judges of England, 76.

else, is giving to mere tenacity of memory a disgraceful advantage over all the finer qualities of the legal intellect."¹

As is well known, the entire body of our private law, so far as it has been stated, is in the form of case law and statute law. The entire body of our common law and equity, so far as it has been stated, is in the form of cases. In this paper it is proposed to consider the best method of avoiding the dangers arising from the accumulation of case law. Mr. Justice Holmes has assured us that "it is a great mistake to be frightened by the ever increasing number of the reports." He says: "The reports of a given jurisdiction in the course of a generation take up pretty much the whole body of the law, and restate it from the present point of view."² This profound observation may sometime be the basis of a practical reform, but any measure aiming to deprive old precedents of their binding quality would meet with strong and deserved opposition from the legal profession and from legal scholars who have awakened a spirit of historical investigation now at work upon the law, and would have little chance of success. So long as the old cases remain binding as precedents, they will be sought out and cited, and must be carried forward from age to age as a living portion of the law.

Thus far no systematic official or legislative action has been adopted to abate the evil of increasing precedents. The American Bar Association has repeatedly discussed the subject and obtained reports from able committees; but no scheme of relief has been framed.³ Unrestricted publication of reports of adjudged cases seems to be demanded. In some of the states and in the United States Supreme Court a number of cases had not been reported, but the pressure of the bar has been such that those cases are now regularly inserted as memoranda in the reports. This practice was begun in New York in 1871, on the coming in of a new state reporter, Mr. Sickels, who explains the reason for his action.⁴ A similar practice exists in other states.⁵ The bar seems to feel instinctively that the strength of the case law comes largely from the fact that judges have given their reasons publicly for their

¹ Cambridge Essays, 1856, 1, 10.

² The Path of the Law, 10 HARV. L. REV. 457, 458.

³ See 18 Rep. Am. Bar Ass'n, 28, 343. See also 21 *ibid.* 16, 437; 26 *ibid.* 437; 27 *ibid.* 450; Dill, Laws and Jurisp. of England and America, 289-90.

⁴ See 46 N. Y. (1 Sickels) III.

⁵ 63 Cal. (1883); 163 U. S. (1895); 21 Rep. Am. Bar Ass'n, 444, as to unreported "conclusions" in New Jersey.

decisions. Every man may read for himself the grounds upon which his case was decided, and the entire legal profession can see and judge the quality of the work. Without weakening this main pillar of the judicial system and of the common law, much may be done by the highest courts, in the exercise of their discretion, to shorten reports by filing mere resolutions or conclusions in cases requiring no extended reasoning. This would apply to all cases which contribute nothing to the elucidation of the law, such as cases involving merely questions of fact, of the existence of fraud, or merely the construction of a will, or whether, in an action for negligence, there was a case for the jury.

Able and enterprising law publishers, writers, and editors have done much to reduce the case law to manageable bulk, and to bring the new cases promptly to the attention of the profession. The well-known reporter system brings to the lawyers of each state the decisions of the highest courts of neighboring states, and thus helps to counteract the tendency of the accumulation of cases to confine their attention to the decisions of their own courts; but the relief attainable by these various experiments is small and temporary. While new encyclopaedias and digests are going through the press, the current of decision is sweeping on, and before the first edition of a new work is finished, a new edition or a supplement must be begun to include the new cases. Law publishers and annotators are less powerful to stop or to confine the course of the common law than Justinian or Napoleon have proved to stop or to confine the course of the Roman or Civil law. It remains for lawyers and judges to devise and adopt some rational method of dealing with the precedents which will prevent their increasing volume from causing danger to the law.

It may be asserted with confidence that the best minds which have labored upon the common law have stood for its unity. In *Norrington v. Wright*, an action by an English merchant against a firm of American merchants upon a contract for the sale and delivery of iron rails, Mr. Justice Gray gave the weight of his name to the statement that "a diversity in the law, as administered on the two sides of the Atlantic, concerning the interpretation and effect of commercial contracts of this kind is greatly to be deprecated."¹ If that be so, how much more is diversity in the common law as administered in the different states of the Union to be

¹ 115 U. S. 188. See Sir Frederick Pollock, *The Vocation of the Common Law*.

deprecatd and avoided, if reasonable means can be found to prevent it.

At the outset it is well to remember the fact that the basis of our case law is the common law and equity system of England. Loyalty to the common law is a sentiment which may well inspire the lawyers and law professors and judges of the United States to unite and to labor for uniformity of law. The common law went forth from England with the colonists and made its way in the new world without any adventitious aid. The colonists were not required to adopt it. They were prohibited from making laws repugnant to the laws of England, but subject to that restriction were at liberty to adopt such laws and customs as were suited to their condition. The following statement of Judge Story is generally accepted as a true statement of the common law: "Our ancestors brought with them its general principles, and claimed it as their birthright; but they brought with them and adopted only that portion which was applicable to their situation."¹ As late as 1810, Thomas Jefferson, in a letter relating to a vacancy in the federal Supreme Court, in reference to the law of the eastern states, said: "The basis of their law is neither common nor civil; it is an original, if any compound can be so called. Its foundation seems to have been laid in the spirit and principles of Jewish law, incorporated with some words and phrases of common law, and an abundance of notions of their own. This makes an amalgam *sui generis*; and it is well known that a man first and thoroughly initiated into the principles of one system of law can never become pure and sound in any other."² Jefferson is cited as a keen observer, well informed in regard to conditions in the colonies. There is truth in what he said, and his views are to some extent corroborated in undoubted sources. In the preface to the Records of the Court of Assistants of the Colony of the Massachusetts Bay, the author says: "In its modes of procedure, the Court seems to have been governed by the general principles of the Common Law which the Colonists had brought with them from England; by the habits of legal practice which they had acquired as Englishmen — some of them by special training; by the limitation in the Charter that no laws should be made repugnant to

¹ *Van Ness v. Pacard*, 2 Pet. (U. S.) 137, 144 (1829).

² 9 Ford, Writings of Jefferson, 285, Letter to Gallatin. See also pp 282-3, in Letter to Madison, and p. 289, Letter to Judge John Tyler.

the laws of England,—as they construed that limitation; and by the guide of those only other sources of law which they recognized,—the Mosaic Code as interpreted by themselves, and the enactments of the General Court from time to time, with the advice sometimes of the Elders of the Churches.”¹ A recent writer speaking of the transfer of the common law to the colonies said: “The legal theory of the transfer has its established place in American jurisprudence; but, historically, it should be modified so as to bring out the fact that we had a period of rude, untechnical popular law, followed, as lawyers became numerous and the study of law prominent, by the gradual reception of most of the rules of the English common law. . . . The theory of the Courts is an incomplete, one-sided statement needing historical modification.”² With the revolutionary struggle and the growth of national feeling came a growth of legal unity. Blackstone’s Commentaries appeared in 1765, and ten years later Burke said in Parliament: “I have been told by an eminent Bookseller, that in no branch of his business, after tracts of popular devotion, were so many books as those on the Law exported to the Plantations. The Colonists have now fallen into the way of printing them for their own use. I hear that they have sold nearly as many of Blackstone’s Commentaries in America as in England.”³ Professor Thayer states the number of copies taken in this country at one thousand.⁴ An American reprint of Blackstone appeared in 1771–72, with a list of nearly eight hundred subscribers, printed at the beginning of the fourth volume, and headed by “John Adams, Esq; Barrister at Law, Boston.” The list of subscribers contains the names of many merchants, with a good representation of farmers and laymen in various walks of life, in addition to lawyers and judges, and calls for about fourteen hundred copies. There can be little doubt that Blackstone did much to make the common law familiar and popular among the colonists prior to the Declaration of Independence. It was then generally accepted as the common law of the United States, and many of its provisions securing personal liberty to the subject were adopted as Bills of Rights in the various state constitutions. In this way the

¹ 1 Records of the Court of Assistants of the Colony of the Mass. Bay, vii, by John Noble, Esq.

² Professor Reinsch, *Select Essays in Anglo-Am. Legal History*, 367, 370.

³ *Conciliation with America*, 1 Payne, *Select Works of Burke*, 182.

⁴ Thayer, *Marshall*, 6.

common law of England has secured a hold upon the people of the United States which can never be shaken off.¹

Still more remarkable is the growth of the chancery jurisdiction in the United States.² For various reasons courts of equity had great difficulty in gaining a foothold in the colonies. It may well be that as a branch of the prerogative equity was hateful to many of the colonists. In a number of instances enactments establishing courts with equity jurisdiction were passed, but annulled by the action of the government in England. In some instances courts of equity were created by ordinance, conferring the powers of a chancellor upon the governor or his assistants, which provoked the opposition of the popular assemblies and of the people. The result was that equity jurisdiction was conferred only slowly and cautiously upon the courts. In Massachusetts full equity jurisdiction was not granted to the courts until 1877. In Connecticut, for more than a century after the organization of the government, equity jurisdiction was retained and exercised by the General Assembly. In New York a court of chancery was created in 1683 by an act of the Assembly, but the governor and his council refused to concur. "The erecting of a court of chancery, afterwards by an ordinance of the 2nd September, 1701, to consist of the Governor and Council, rendered it extremely unpopular; and frequent but fruitless attempts were made by the Assembly to destroy the court."³ Chancellor Kent states that when appointed chancellor in 1814, he "took the court as if it had been a new institution and never before known in the United States."⁴ In Pennsylvania a

¹ It is worthy of notice that after the Revolution the feeling against England was so strong that some states prohibited the citation of English authorities in the courts. See the New Jersey statute of 1799, cited by Judge Baldwin in *Two Centuries' Growth of Am. Law*, 1, and found in Patterson, *Laws* (1800), 435, 436. My friend Judge Swayze of the New Jersey Court of Errors informs me that this law was superseded by a more stringent statute of December 1, 1801, which imposed a penalty upon counsel who disobeyed it (Pamphlet *Laws* of 1801, 127); but in 1820 the statute of 1801 was repealed. Revision of 1820, 726; Pamphlet *Laws* of 1820, 126.

² In 1 *Select Essays in Anglo-Am. Legal History*, 366, the reader will find a valuable list of references to authorities on the system of law and equity in the colonies. Good matter will also be found in the following citations: Washburn, *Judicial History of Mass.*; Parker v. Simpson, 180 Mass. 334, opinion by Mr. Justice Hammond; 1 *History of Bench and Bar of New York*, 69-74; Whittlesey v. Hartford, P. & F. R. R. Co., 23 Conn. 421, 430; 1 Root, *Reports*, XXXIII; *Federalist*, Nos. 80 and 83, by Hamilton.

³ See reporter's preface, 1 *Johns. Ch. (N. Y.)*.

⁴ *Memoirs and Letters of Chancellor Kent*, 158. See also 1 *Great Am. Lawyers*, 435, 444, *et seq.*, sketch of Robert R. Livingston, by James Brown Scott.

court of chancery was created in 1720, but had a brief existence of sixteen years, after which equity was administered for a century through common law forms.¹ In the southern colonies the chancery jurisdiction seems to have caused less friction. The first equity cases reported in America are to be found in a folio volume of decisions by the High Court of Chancery in Virginia, published by Chancellor Wythe in 1795.² This was followed by Desaussure's Equity Reports, consisting of three volumes of cases argued and determined in the Court of Chancery of the State of South Carolina from the Revolution to December, 1813. They were published in 1817, while the first volume of Johnson's Chancery, New York, containing the cases from March, 1814, to December, 1815, was published in 1816. In view of the condition of equity jurisdiction in the state courts in 1789, it was fortunate and very remarkable that the federal Constitution extended the judicial power of the new government to all cases "at law and in equity," arising under the Constitution and laws of the United States.³ Under this grant of power and the legislation of Congress, beginning with the Federal Judiciary Act, a uniform system of equity law and practice was secured to the country in the federal courts. "Without the assent of Congress that jurisdiction cannot be impaired or diminished by the statutes of the several states regulating the practice of their own courts."⁴ This great jurisdiction has been a powerful influence in the past and is likely to be more potent in the future on the side of uniformity of law. One method of its operation in the past may be seen in the following language of Campbell, J., in declaring a state statute unconstitutional which assumed to provide for a final decision of questions of fact in chancery suits by the verdict of a jury. "As Michigan had a long territorial experience, its judicial system naturally became fashioned in close analogy to that of the United States, and so recognized and perpetuated in their essentials the classification of legal and equitable rights as

¹ 1 L. Quar. Rev. 455, article by Sydney G. Fisher, *The Administration of Equity through Common Law Forms*. See p. 457.

² Soule, *Reference Manual*, 61, n. 9.

³ The words "cases in law and equity" were inserted in the draft prepared by the Committee of Detail, on motion of Johnson of Connecticut, apparently without debate. See Bancroft, *Formation of the Constitution*, B. III, c. X; Gilpin, 1438, 1439. The reader will find some reference to Johnson of Connecticut in 1 *Great Am. Lawyers*, 320, sketch of Oliver Ellsworth, by Frank Gaylord Cook.

⁴ *Mississippi Mills v. Cohn*, 150 U. S. 202, 205 (1893).

involving the necessity of separate administration in important particulars."¹

English common law and equity being the basis of much of our case law, it is manifest that English precedents cannot safely be ignored by American lawyers and judges. Where a rule of English common law or equity has been adopted by the courts as a part of our law, the duty would seem to be clear to endeavor to discover the true ground and scope of the rule, and to apply it logically to all concrete cases. The same applies to all rules of law, whatever their origin. In our system every case decided by a court has a twofold office. In the first place, it is an exercise of public powers by a court or magistrate charged with the duty of administering public justice, and puts an end to the controversy between the parties. In that aspect the case is of interest only to the parties. In the second place, under our law, the case is a precedent, binding upon all inferior courts and not to be departed from by the court which decided it except upon very cogent reasons. As a precedent, the important questions are, what did the case decide and what were the precise grounds of decision? The reason of the decision is the vital question to one who is seeking to master the science of law, or to one who is seeking light to enable him to decide correctly another concrete case. As a precedent, the case is nothing but an illustration of the application of a principle to concrete facts. It is valuable for its reasoning, and for little else. Such is the view of Lord Mansfield,² which seems to be countenanced by Mr. Justice Holmes, when he says that it is a mistake to be frightened at the increase of reports. Professor Langdell held the same view, and taught the same doctrine. He said that much the shortest and best, if not the only effective way of mastering legal doctrine was by studying the cases in which it is embodied. "But," he adds, "the cases that are useful and necessary for this purpose at the present day bear an exceedingly small proportion to all that have been reported. The vast majority are useless and worse than useless for any purpose of systematic study."³ One practical problem, then, in dealing with the precedents is to evolve some principle of selection by which the cases that are useful as precedents may be separated from those which are useless to all

¹ *Brown v. Buck*, Circuit Judge, 75 Mich. 274, 277 (1889).

² See *Rex v. Bembridge*, 3 Dougl. 327, 332 (1783), cited in Dill, *Laws and Jurisp. of England and America*, 182.

³ Langdell, *Cas. on Contracts*, 2 ed., VIII.

but the parties. This ought not to be done or to be attempted by an exercise of legislative power, such as the periodical revision and consolidation of the statutes, which takes place in most of the states, but should be brought about by a process of natural development, by common consent, through the competition of different methods of dealing with the subject. Out of the many collections of cases by learned law professors for the use of students of law, or by legal writers for general use, some may gain authority and credit by their conceded superiority, and be accepted as containing all the cases that are useful for general study upon the subject to which they relate. Just as Littleton's *Tenures* and Blackstone's *Commentaries* have attained the rank of classics among text-books, and acquired almost unquestioned authority in the historical development of the law, under the new method of study by cases it seems not impossible that some collections of cases may attain similar rank.

The great and controlling question, however, is not what cases, out of the mass of reported decisions, shall be accepted as authority, but in what manner the cases shall be studied and used. If they are habitually studied and used by the courts and the bar as illustrations, and valuable only for the principles embodied and applied in them, little danger will result from the increase in their number. In fact that is the way the cases have always been dealt with by the great common law lawyers. They reason from principle, and as a rule neither need nor cite many cases. The time has come when this course must be adopted more generally and applied more vigorously if the law is not to be lost in the mere accumulation of cases. If the cases were so dealt with, it is not contended that differences in the common law of the several states would disappear, but uniformity of the common law would be preserved to a far greater extent than at present, and new diversities would be less likely to arise in the future. "One mark of a great lawyer is that he sees the application of the broadest rules."¹ The persistent and faithful study of those cases which may be called the fountains of the law, to discover their reason, develops the faculty of seeing the application of the broadest rules, tends strongly toward uniformity of law when the rules are steadily and logically applied by lawyers and judges in the daily administration of the law, and is the best safeguard now available against the

¹ O. W. Holmes in 10 HARV. L. REV. 474.

dangers resulting from the accumulation of case law. The maxim which Sir Edward Coke and Professor Langdell united in indorsing has acquired new force and meaning: *Melius est petere fontes quam sectari rivulos.*

Before proceeding further to consider the efficacy of this method of dealing with the precedents, it will be useful to consider the results which have followed in a conspicuous case where the court failed to adhere to principle. In *Lawrence v. Fox*¹ the plaintiff brought an action of contract supported by the following evidence: *viz.*, "that one Holly, in November, 1857, at the request of the defendant, loaned and advanced to him \$300, stating at the time that he owed that sum to the plaintiff for money borrowed of him, and had agreed to pay it to him the then next day; that the defendant in consideration thereof, at the time of receiving the money, promised to pay it to the plaintiff the then next day." The court overruled a motion by the defendant for a nonsuit and submitted the case to the jury, who returned a verdict for the plaintiff. The case was taken to the Court of Appeals, and there argued upon three points: first, that there was no competent evidence that Holly was indebted to the plaintiff; second, that the agreement by the defendant with Holly to pay the plaintiff was void for want of consideration; and third, that there was no privity between the plaintiff and the defendant. The court, by Hiram Gray, J., sustained the action, and concluded its discussion of the third point with these words: "if, therefore, it could be shown that a more strict and technically accurate application of the rules applied, would lead to a different result, (which I by no means concede) the effort should not be made in the face of manifest justice."² The majority of the court also relied on precedents. Gray, J., said: "As early as 1806 it was announced by the Supreme Court of this state, upon what was then regarded as the settled law of England, 'that where one person makes a promise to another for the benefit of a third person, that third person may maintain an action upon it.' *Schermerhorn v. Vanderheyden* (1 Johns. 140) has often been reasserted by our courts and never departed from." *Schermerhorn v. Vanderheyden* is a *per curiam* opinion based on *Dutton v. Poole*³ and some other citations, wholly inconsistent with principles of contract and consideration thoroughly established in the common law when *Lawrence v. Fox* was decided. Johnson, Ch. J., and Denio, J., were of

¹ 20 N. Y. 268 (1859).

² 20 N. Y. 275.

³ 1 Vent. 318.

opinion that the promise of Fox was to be regarded as made to the plaintiff through the medium of his agent, whose action he could ratify when it came to his knowledge though taken without his being privy thereto. Comstock, J., delivered a vigorous dissenting opinion, beginning with the statement: "The plaintiff had nothing to do with the promise on which he brought this action."¹

Turning to Langdell's Summary of Contracts, the rule is thus stated:

"It was decided in *Dutton v. Poole*² (1677), that a daughter might maintain an action on a promise made to the father for her benefit, though it had previously been decided (*Bourne v. Mason*) as it has been since (and uniformly in England, *Crow v. Rogers*, *Price v. Easton*) that a person for whose benefit a promise was made, if not related to the promisee, could not sue upon the promise. This latter proposition is so plain upon its face, that it is difficult to make it plainer by argument. A binding promise vests in the promisee, and in him alone, a right to compel performance of the promise, and it is by virtue of this right that an action is maintained upon the promise. In the case of a promise made to one person for the benefit of another, there is no doubt that the promisee can maintain an action not only in his own name, but for his own benefit. If, therefore, the person for whose benefit the promise was made could also sue upon it, the consequence would be that the promisor would be liable to two actions. In truth, a binding promise to A to pay \$100 to B confers no right upon B in law or equity. It confers an authority upon the promisor to pay the money to B, but that authority may be revoked by A at any moment. Of course it follows that the distinction upon which *Dutton v. Poole* was decided is untenable; and accordingly that case has been overruled. *Tweddle v. Atkinson*."

Has this statement of the case against allowing a stranger to a contract to bring an action upon it ever been met by any court which has allowed the action? Mr. Lawrence had no right, either legal or equitable, under the contract between Fox and Holly. If they had desired to confer a right upon him, the law provided a variety of methods by which it could be done. It was competent for Holly to act as agent for Lawrence in making the contract, if he had chosen to do so, and then upon familiar principles of agency Lawrence could ratify the act of one who had assumed to be his

¹ 20 N. Y. 275.

² Langdell, Summary of Contracts, 2 ed., § 62.

agent. It was competent for Holly to make a declaration of trust in regard to the promise of Fox, in favor of Lawrence; or to require an undertaking from Fox that he would pay to Lawrence the specific fund of \$300 delivered to him, thereby impressing upon it a trust; or for all three parties to effect a novation by making the promise necessary to extinguish the debt from Holly to Lawrence, and substitute for it a new debt or obligation from Fox to Lawrence. They did none of these things, and upon the facts proved it cannot be argued in support of the decision that they attempted to do any of these things. If the law provided no reasonable means by which Lawrence could acquire a right against Fox upon the transaction described, there might be ground for straining to extend him a remedy; but with ample means existing in the law to create a right in his favor, which was not used in his behalf, why should the court trouble itself to give Mr. Lawrence a remedy when he had no right?

The subsequent history of the case of *Lawrence v. Fox* is full of interest. Any student of the law will be well repaid for his labor, by reading all the subsequent decisions of the Court of Appeals in which the case has been cited and considered. Most students I believe will rise from that labor with the conviction that it would have been better for the law if Mr. Lawrence had been denied a remedy. It is plain that the Court of Appeals itself has not been satisfied with the decision. In *Pardee v. Treat*, Andrews, J., says: "The recent cases show that the court is disinclined to extend the rule in *Lawrence v. Fox*."¹ In *Wheat v. Rice*, Finch, J., says: "We prefer to restrict the doctrine of *Lawrence v. Fox* within the precise limits of its original application."² And again, in *Gifford v. Corrigan*: "Of course, it is difficult, if not impossible, to reason about it without recurring to *Lawrence v. Fox* (20 N. Y. 268) and ascertaining the principle upon which its doctrine is founded. That is a difficult task, especially for one whose doubts are only dissipated by its authority, and becomes more difficult when the number and variety of its alleged foundations are considered. But whichever of them may ultimately prevail, I am convinced that they all involve, as a logical consequence, the irrevocable character of the contract after the creditor has accepted and adopted it, and in some manner acted upon it. The prevailing opinion in that case vested the creditor's right upon

¹ 82 N. Y. 385 (1880).

² 97 N. Y. 296, 302 (1884).

the broad proposition that the promise was made for his benefit, and, therefore, he might sue upon it, although privy neither to the contract or its consideration."¹ Space will not here permit the pursuit of *Lawrence v. Fox* through all the refinements and distinctions which it has engendered, but there is good reason for the assertion that it has brought some confusion and uncertainty into the law. Harriman on Contracts says: "This rule has no foundation in principle, and is a pure case of judicial legislation; but the rule has been widely adopted throughout the United States, and has led to great confusion in the law."² A graduate of the Harvard Law School, writing as a practicing lawyer in New York, says: "The New York courts, however, were soon put on the defensive, and, pitifully and apologetically squirming and shifting under the heavy burden, began to limit the new rule and hem it about. . . . We find a never-ceasing pricking of conscience."³ In Wald's *Pollock on Contracts*, Professor Williston says: "The law of New York is in rather dubious condition. It has been laid down in some cases that in order to entitle one who is not a party to a contract to sue upon it, the promisee must owe him some duty; but from recent cases it seems that a moral duty is enough, and this gives the court considerable latitude."⁴

In the face of comments like these, and others which may be made, equally well founded, it is of little value to say that the doctrine of *Lawrence v. Fox* has spread far and wide in the United States, and that Massachusetts is now the only state which adheres to the general rule that a third person cannot sue upon a contract made for his benefit. If the lawyers and judges of Massachusetts have been remiss in the pursuit of "manifest justice," they have the satisfaction of seeing the Supreme Judicial Court sailing over untroubled seas in the law of contracts, under the friendly light of the common law, while the highest courts of sister states are struggling among the rocks and shoals to which they have been guided by the false light of *Lawrence v. Fox*. The more serious matter to be considered is that, in departing from the sound principles of the common law upon this important subject, many courts have become involved in diversity and uncertainty due to a failure to perceive or to state clearly any logical ground upon which the de-

¹ 17 N. Y. 257, 263 (1889).

² Harriman, *Contracts*, 2 ed., 213.

³ 1 HARV. L. REV. 226, *Privy of Contract*, by Jesse W. Lillienthal.

⁴ Wald's *Pollock*, *Contracts*, 250.

parture from sound principle was based. When the action of the courts leads to contradictory decisions or to uncertainty in the common law, relief must be had from some quarter, and the only available source of relief is the legislature. It cannot be said in all cases that it is undesirable that the legislature should be invoked to enact laws affecting the common law as declared by the courts. Such legislation at times is necessary and proper as a result of industrial or economic or social changes in society. Thus the rule established in the case of *Farwell v. Boston & Worcester Railroad*,¹ by which a master was not answerable to his servant for injuries received in consequence of the negligence of a fellow servant, after a career of nearly half a century, has been profoundly modified by the Employers' Liability Act, and in England by the Workmen's Compensation Act—legislation which may well be justified on the ground that the rule of the common law established before 1850 was unsuitable to the great industries and changed conditions of the present day. The law of contracts, the law of torts, the law relating to personal property, and the entire system of equity may be said to be the work of the courts, and but slightly influenced by legislation. As a general rule it is better that the evolution of the law in those important subjects should continue through the agency of the courts rather than of the legislature; and it may further be said that it is highly undesirable that the need for legislation on those subjects should result from unsound or illogical action by the courts themselves. This is one of the evils resulting from *Lawrence v. Fox*. Thus Mr. Lilienthal suggested, in the article above cited, "Perhaps we shall get relief from the Field Code, which begins to loom up with terrible distinctness, and already poses as the layman's panacea and the lawyer's dragon."²

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BOSTON.

[*To be continued.*]

¹ 4 Met. (Mass.) 49 (1842).

² 1 HARV. L. REV. 232.

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POWER OF THE INTERSTATE COMMERCE COMMISSION TO INTERROGATE. — In the course of an investigation instituted in pursuance of one of its resolutions, the Interstate Commerce Commission interrogated the defendant with the object of ascertaining whether the directors of the U. P. railroad had expended its funds while the defendant was an officer of that corporation in buying stocks at wrongfully inflated prices or stocks that should not have been purchased. Upon his refusal to answer these interrogatories the commission sought the aid of a federal court, which directed him to answer. *Interstate Commerce Commission v. Harriman*, 157 Fed. 432 (Circ. Ct., S. D. N. Y.). A preliminary consideration¹ is whether the commission has been given power to propound these interrogatories. In view of the broad terms of the Interstate Commerce Act² and of the Supreme Court's construction that it endows the commission "with plenary administrative power to supervise the conduct of carriers, investigate their affairs, their accounts, . . . and generally to enforce the provisions of the act,"³ this must be decided in the affirmative. The more fundamental consideration is whether Congress itself could constitutionally press these interrogatories, since otherwise its delegation to the Commission would be futile. The inquisitorial power of legislative bodies has received but little consideration. The importance to such a body of the ability to gather information before acting, is readily apparent. Necessity seems to have established the power and

¹ Whether these interrogatories were pertinent to the inquiry defined by the resolution is not considered, since any difficulty on this score can be obviated by a differently worded resolution.

² 24 Stat. at L. 379; amended 34 Stat. at L. 584.

³ *Texas, etc., Ry. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 438. See also *Interstate Com. Com. v. Brimson*, 154 U. S. 447; *Same v. Cincinnati, etc., Ry.*, 167 U. S. 479, 506; *Same v. Baird*, 194 U. S. 25, 41.

determined its extent — a legislature may conduct an investigation, which includes interrogating, but only to aid it in the performance of a constitutional function.⁴

The court apparently believed that Congress in two ways could constitutionally legislate on the subjects concerning which the defendant was directed to testify, and both involve points embarrassing because of difficulty and of novelty. One was that Congress could limit the interstate operations of corporations whose funds were not handled as Congress desired.⁵ This is difficult to support. The power to regulate commerce is the power "to prescribe the rule by which commerce is to be governed."⁶ It is not necessarily fatal that the rule takes the form of a prohibition,⁷ or that Congress' hope is to attain thereby some other object within its power.⁸ But "manifestly, any rule prescribed for the conduct of interstate commerce, in order to be within the competency of Congress under its power to regulate commerce among the states, must have some real or substantial relation to or connection with the commerce regulated";⁹ that is, it must do more than merely indirectly affect interstate commerce. To keep corporations out of interstate commerce because of the way their funds are invested, seems directly to regulate corporate finance, and indirectly to affect interstate commerce. It would be very close to what the court, quoting from the Employers' Liability Cases,¹⁰ properly admits Congress cannot do — control the general conduct and business of persons engaged in interstate commerce. The distinction here sought to be drawn may clearly be seen in the many cases upholding state statutes merely indirectly affecting interstate commerce and not regulating it. The other method suggested by the court was that Congress might regulate the capital as an instrumentality of interstate commerce. The argument for this method is that the capital is wealth appropriated to carry on interstate commerce, and without it interstate commerce could not be conducted; therefore the capital is an instrumentality of interstate commerce, and the courts have laid it down broadly that the power of Congress extends to all instrumentalities. But this would not apply to the investment of all corporate funds.¹¹ Also, the regulation of these instrumentalities should refer directly and substantially to the conduct of interstate commerce. No help can be derived from the federal police power, since neither the morals, safety, nor health of the community is at stake.¹² It is submitted that the interrogatories might have been sustained because of the power of Congress to prevent combinations or devices

⁴ See *People v. Keeler*, 99 N. Y. 463; *Kilbourn v. Thompson*, 103 U. S. 168; *In re Chapman*, 166 U. S. 661; *Interstate Com. Com. v. Brimson*, *supra*; *Wilckens v. Willet*, 1 Keyes (N. Y.) 521, 525.

⁵ In support of this view, see Report of Commissioner of Corporations, Dec. 1904, 43, 49.

⁶ Marshall, C. J., in *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1, 106.

⁷ *United States v. Brigantine "William"*, 2 Hall's Am. L. J. 255; *The Lottery Case*, 188 U. S. 321.

⁸ Congress so used the taxing power. See *Veazie Bank v. Fenno*, 8 Wall. (U. S.) 533.

⁹ *Adair v. United States*, 208 U. S. 161, 178. See also *United States v. E. C. Knight Co.*, 156 U. S. 1, 13; *Employers' Liability Cases*, 207 U. S. 463, 495; *Mr. Victor Morawetz* in 17 HARV. L. REV. 533; 20 HARV. L. REV. 499; *Prentice, Federal Power*, 53 *et seq.*, 219 *et seq.*

¹⁰ 207 U. S. 463, 502, 505.

¹¹ The court apparently overlooked the fact that the funds in question were the proceeds of a bond issue. Its reasoning, however, might be applicable to these funds.

¹² *The Lottery Case*, *supra*; 20 HARV. L. REV. 658; *Freund, Police Power* § 66.

in restraint of interstate commerce,¹⁸ and on a line of reasoning that, since Congress may regulate rates of interstate railroads, it is entitled to have full particulars as to the corporation's assets and liabilities in order that it may properly exercise this function. Also, if the directors acted unconscionably, the corporation's right to recover any profits they thereby realized might be considered an asset.

RETENTION OF JURISDICTION AFTER TERMINATION OF RECEIVERSHIP.—One of the difficulties incident to the concurrent jurisdiction of federal and state courts appeared recently in the case of a federal receivership where the court imposed on the buyer of the property the duty of paying all claims against it, reserving to itself jurisdiction over all such claims. A decision of the Supreme Court now holds that a state court was without power to foreclose to satisfy one of these claims. *Wabash R. R. Co. v. Adelbert College*, 208 U. S. 38. This result does not rest on a doctrine of constructive possession of the *res* by the federal court after the sale, nor involve any extension of federal jurisdiction. When a *res* is subject to the concurrent jurisdiction of two courts and one of them takes actual possession, as regards questions involving the possession, it is in effect removed from the territory of the other court.¹ While one court has possession it is no more within the power of the other to determine rights in the *res* than it is within the power of a court of one state to determine interests in land lying in another state. This rule goes to the extent of saying that a sale made by order of the second court would pass no title.² But the exclusiveness of control ends when actual possession ends.³ In the case under discussion the property was subject to several junior mortgages and alleged equitable liens. None of these gave any legal interest in the property; at most they were only rights to be paid out of the proceeds of the property according to priority after judicial sale.⁴ When such a sale is made without fraud and under the supervision of the court, for the express purpose of getting the entire proceeds of the property so as to pay off the claims, these equitable rights in the property are exhausted and holders have left their claims as creditors against the proceeds. This is true whether they were parties to the foreclosure or not, for the court can compel the appearance of all who claim an interest in the property,⁵ and if they cannot be found, can adjudicate their rights after service by publication.⁶ The result is that the court can sell the property for its full value free from all such equitable liens, and will distribute the proceeds among those entitled. This fund being in the actual possession of the court, no other court can adjudicate claims against it.

The sale, however, need not be for cash, and was not in this case. Part of the consideration may be the assumption by the buyer of the express duty to pay certain claims as their validity is established. This obligation being estimated by the buyer, he may bid in the property for what he will

¹⁸ *Northern Securities Co. v. United States*, 193 U. S. 197; *United States v. Joint Traffic Ass'n*, 171 U. S. 505.

¹ *In re Tyler*, 149 U. S. 164. See 17 HARV. L. REV. 196; 21 HARV. L. REV. 279.

² *Wiswall v. Sampson*, 14 How. (U. S.) 52; *Heidritter v. Elizabeth Oil Cloth Co.*, 112 U. S. 294; *Walling v. Miller*, 108 N. Y. 173.

³ *Walker v. Flint*, 7 Fed. 435; *Logan v. Greenlaw*, 12 Fed. 10.

⁴ See *Perry v. Board of Missions*, 102 N. Y. 99; *Jones, Liens*, § 28.

⁵ *Farmers' Loan Co. v. Houston & T. C. Ry. Co.*, 44 Fed. 115.

⁶ *Goodman v. Niblack*, 102 U. S. 556.

give in addition and bind the property as security for the obligation. But the court holds all the proceeds, both money and obligation, and claimants must come to it if they seek payment.⁷ It must be remembered that the buyer is under no obligation except by the terms of the sale and that the property is entirely free from the old liens and subject only to a new one as security for the obligation.

If this analysis is sound, it is apparent that express reservation of jurisdiction, though sweeping in terms, is in fact only an express statement of what is the court's undisputed jurisdiction — control over the proceeds while in its possession. Judgment liens established by state courts before the federal court took possession are *res adjudicata* and, as the court intimates, will be allowed as such by the federal court. The doctrine does not of course limit the jurisdiction of state courts over rights in the property acquired after the sale, or prevent suits in state courts based on legal interests in the property which existed before the court took possession. The federal court can only sell the debtor's property, and if the marshal purports to sell what in fact belonged to another, the buyer can get no title to that portion.⁸ The reservation covers only claims against the proceeds as such of the debtor's property. The general doctrine, it may be added, should apply equally when a state court has possession of the proceeds.⁹

THE RELATION OF MISTAKE TO THE PROBLEM OF INTERPRETATION OF WILLS. — A recent decision of the Supreme Court of Illinois offers opportunity for an examination of the relation which mistake should bear to the problem of interpretation of wills. In this case it was held that a devise of the "north half" of a certain quarter section of land, which the testator did not own, was effectual to convey the legal title to the east half. *Felkel v. O'Brien*, 83 N. E. 170.¹ Since the statutes require that wills shall be in writing, signed, and attested, it is obvious that the desires of a testator cannot take effect by virtue of those statutes unless the will contains a proper written expression of those wishes.² It follows that before the work of interpretation can begin, it must first be determined that the testator has used words in some sense other than their direct and primary meaning. The fact that the testator has used words whose primary sense does not convey the concept which extrinsic circumstances prove him to have purposed to convey, is some evidence that the testator has used a language which requires interpretation, but it is not conclusive, for there is always present the possibility of mistake. If one who was accustomed to speak of his one hundred and forty-ninth street house as his forty-ninth street house, should

⁷ *Mercantile Trust, etc., Co. v. Roanoke & S. Ry. Co.*, 109 Fed. 3; *State Trust Co. v. Kansas City, etc., Ry.*, 110 Fed. 10; *Julian v. Central Trust Co.*, 193 U. S. 93. The same rule applies when the buyers assume the liability for torts committed by the receivers. *Stewart v. Wisconsin Cen. Ry. Co.*, 117 Fed. 782; *Central Trust Co. v. St. Louis, A. & T. Ry. Co.*, 59 Fed. 385; *Jesup v. Wabash, etc., Ry. Co.*, 44 Fed. 663.

⁸ *Campbell v. Parker*, 59 N. J. Eq. 342.

⁹ *Hutchinson v. Green*, 6 Fed. 833.

¹ *Whitehouse v. Whitehouse*, 113 N. W. 759 (Ia.); *Patch v. White*, 117 U. S. 210. Cf. *Thomson v. Thomson*, 115 Mo. 56; *Lynch v. Lynch*, 142 Cal. 373; *Williams v. Williams*, 189 Ill. 500. But see *Tucker v. Seaman's Aid Society*, 7 Met. (Mass.) 188.

² See Thayer, *Prel. Treatise on Evidence*, 395; *Hawkins*, 2 *Jurid. Soc. Papers*, 298 302. Cf. *Gibson v. Minet*, 1 H. Bl. 569, 614.

by will dispose of his "forty-ninth street house,"³ it is clear that he has made an exact written expression of the conception which he entertained, though it is in a unique language which the court may translate if the spirit of the statute of wills permits the use of language that does not convey its meaning to persons familiar with the national speech, which has been thus perverted.⁴ On the other hand, when one who owns and intends to devise the southeast quarter of a certain section of land describes it as the northeast quarter of that section, the words themselves bear almost conclusive evidence that the testator was using, not his own peculiar language, but rather the language of a particular survey of that section and, by inadvertence, has failed to choose the particular words of that language which would give a written expression of his intent. The element of mistake has entered and defeated the testator's purpose to comply with the statute of wills.

It has been suggested, however, that the court may strike out the "false" words of description and thus produce an equivocal description which may then be applied to the land which the testator intended to devise.⁵ While it may be open to grave doubt whether or not words which apply equally well to more than one thing may be said to designate any particular one of them,⁶ the conclusive argument against this contention is that courts cannot, with propriety, strike from a will words inserted by mistake. If the words are actually stricken from the instrument, the altered document is not the writing which the testator signed and the witnesses attested.⁷ If, on the other hand, the "striking out" is purely fictitious, it is but a circuitous method of "interpretation."

Because the process of interpretation cannot be used to correct mistakes in wills, it does not follow that our courts are helpless to relieve the situation. It is submitted, however, that equity alone can adequately deal with the matter. How far the chancellor would go in declaring that the legal titles which have accrued because of a testator's inadvertence shall be held in constructive trust for the intended beneficiaries, is problematical. But a due regard for the rights of third persons who, before any question of construction has been raised, have reasonably acted in reliance on the primary meaning of the words of a will,⁸ demands that the problem be solved by a court which can both protect such persons, and, as far as possible, effectuate the desires of testators.

TIME WHEN AN INHERITANCE TAX ON PERSONALTY ACCRUES.—Inheritance tax statutes ordinarily provide for a tax when property passes by will or by intestate laws to any person except a father, mother, brother, etc. The tax is imposed not on the property transferred, but solely on the

³ *Peters v. Porter*, 60 How. Pr. (N. Y.) 422.

⁴ *Cf. Wigram, Interpretation of Wills*, 10.

⁵ *Patch v. White, supra*; *Whitehouse v. Whitehouse, supra*.

⁶ See Mr. Justice Holmes in 12 HARV. L. REV. 417.

⁷ See *Rhodes v. Rhodes*, 7 App. Cas. 192, 198. The English Court of Probate does, on proffer for probate, strike out such words, unless the will was read over to the testator before execution. It is believed that this anomalous doctrine has never been tested in a court of appeal. In the *Goods of Duane*, 2 Sw. & Tr. 590; In the *Goods of Boehm*, [1891] P. 247.

⁸ In *Patch v. White, supra*, the testator died in 1832 and the first argument of the ejectment suit brought against a third person was not heard by the Supreme Court until 1885.

transfer or passing of the property.¹ When does personal property pass within the meaning of the statute? In a recent case in New York it was decided that on the death of a non-resident intestate his estate *eo instanti* passes to his next of kin and that the state's right to an inheritance tax on the shares of all non-exempt distributees vests at once, and cannot be defeated by the administrator's election to apply the New York assets to the payment of the claims of an exempt distributee. *Matter of Ramsdill*, 190 N. Y. 492. In an earlier case in the same jurisdiction it was held that where a testator domiciled in England left personalty in that country and also in New York, his executor, by paying the non-exempt legatees out of the English assets, could escape payment of the New York inheritance tax.² It is argued that the tax is on the succession, and since the executor has chosen to apply assets in another jurisdiction to the payment of the legacies of non-exempt legatees, there has been no succession by such legatees to any property in New York. This is only another way of saying that on the death of the testator no property passes to the legatees. The state's right to the tax depends not upon a formal change of title but upon the passing of the instant right to a beneficial interest.³ The distinction taken by the New York court that such a beneficial interest passes to the next of kin on the death of an intestate, but does not pass to the legatee on the death of a testator, seems unfounded in reason. For neither an executor nor an administrator takes any beneficial interest in the decedent's property. And on the death of the testator or intestate both legatees⁴ and next of kin⁵ get an immediate interest in the personal estate analogous to that of a *cestui que trust*. Accordingly the next of kin at the time of the intestate's death and not those at the time of distribution take the personal estate.⁶ The share of a distributee who dies before distribution goes to his personal representative.⁷ And income derived from the estate after the decedent's death is not liable to the tax.⁸ It follows that within the meaning of the statute property passes both under a will and under intestate laws on the death of the testator or intestate, and at that time the state's right to the inheritance tax accrues.⁹ Once the state's right to the tax has vested, neither the executor¹⁰ nor the administrator should be allowed to defeat it. It cannot even be surrendered by legislative act.¹¹ Accordingly, if a testator leaves property to an illegitimate son who is subject to an inheritance tax, the administrator must pay the tax, though the legislature passes an act on the day after the testator's death legitimating the son.¹²

By the weight of authority no inheritance tax can be collected when a legatee renounces his legacy.¹³ This result can be reached only by a resort

¹ *Magoun v. I. T. & S. Bank*, 170 U. S. 283; *Plummer v. Coler*, 178 U. S. 115.

² *Matter of James*, 144 N. Y. 6. See also *Matter of McEwan*, 51 N. Y. Misc. 455.

³ *Kingsbury v. Chapin*, 82 N. E. 700 (Mass.).

⁴ *Hooper v. Bradford*, 178 Mass. 95; *Mechanics' Savings Bank v. Waite*, 150 Mass. 234.

⁵ *Perryman v. Greer*, 39 Ala. 133.

⁶ *Thompson v. Thomas*, 30 Miss. 152; *Moore v. Gordon*, 24 Ia. 158.

⁷ *Rose v. Clark*, 8 Paige (N. Y.) 574.

⁸ *Williamson's Estate*, 153 Pa. St. 508; *Matter of Will of Vassar*, 127 N. Y. 1.

⁹ *Matter of Westburn*, 152 N. Y. 93; *Lines's Estate*, 155 Pa. St. 378; *Hooper v. Bradford*, *supra*.

¹⁰ *Kingsbury v. Chapin*, *supra*. See also *Greves v. Shaw*, 173 Mass. 205.

¹¹ *Trippett v. State*, 149 Cal. 521.

¹² *Galbraith v. Com.*, 14 Pa. St. 258; *Com. v. Stump*, 53 Pa. St. 132.

¹³ *In re Estate of Stone*, 132 Ia. 136; *Matter of Wolfe*, 89 N. Y. App. Div. 349. *Contra*, *Frank's Estate*, 9 Pa. Co. Ct. 662.

to the fiction of relation. Although a beneficial interest vests in the legatee on the testator's death, he has a right to reject it.¹⁴ When once he exercises this right his share falls back into the residuary, and the residuary legatees by relation take an interest in it from the death of the testator. The transfer, then, has been in effect directly to the residuary legatees and therefore if they are non-taxable the state has no right to collect a tax.

THE NATURE OF THE JURISDICTION OF UNITED STATES COURTS ESTABLISHED IN FOREIGN COUNTRIES. — The extent to which treaties allow the United States to exercise extraterritorial jurisdiction is to enforce duties owed by its own citizens. Their rights are governed and administered by the law and the local courts, whether native or consular, of the person who wrongs them.¹ The nature of the jurisdiction so exercised must be determined by the terms of the treaty giving the power, and the act creating the tribunal. An interesting example of such an act is that of June 30, 1906, establishing the United States Court for China and giving it jurisdiction of the more important civil and criminal cases against American citizens in China, formerly heard before the American consular courts there.² The act greatly restricts the jurisdiction of the consuls and allows appeals from their judgments to the new court in all cases. The Circuit Court of Appeals for the Ninth Circuit has recently held that this court has jurisdiction of an offense committed by an American in China, where the act constituted a crime by the "common law," — meaning the common law of the colonies at the time of the separation from Great Britain. *Biddle v. United States*, 156 Fed. 759. Of course, this does not imply that the court is attempting to fasten the English common law on the Chinese Empire, but simply denotes that the United States has authority to apply this somewhat abstract system of law in the exercise of its extraterritorial privileges in China. The sanction of such extraterritorial jurisdiction is the consent of the Emperor of China, expressed in the treaties with the United States, to the effect that citizens of the United States sued or charged with crime in China shall be tried and punished "according to the laws of the United States."³ And, in defining these laws for the exercise of the jurisdiction thus granted, Congress enacted in the Act of 1906 as well as in the previous acts which concerned the consular courts, that the "common law" shall be applied when existing laws are deficient to give jurisdiction.⁴ The act rightly and clearly recognizes, however, that the jurisdiction of the United States is dependent on and limited by the terms of the treaties with China. The jurisdiction of the United States in China is binding simply because of the presence of American citizens in the territory of an emperor who, by force of his personal jurisdiction over them, has placed them under the jurisdiction of their sovereign. And clearly it is not the delegation of a qualified territorial jurisdiction, but the grant of personal jurisdiction,⁵ as it does not extend to persons who are not American citizens.⁶ But the consular courts and the Court for China will entertain suits by foreigners against American citizens in China,⁷ and will bind and punish them without

¹⁴ *Watson v. Watson*, 128 Mass. 152; *In re Estate of Stone*, *supra*.

¹ Piggott, *Exterritoriality*, 21.

² 34 Stat. at L. 814.

³ Treaty with China, June 18, 1858, Art. XI, XXIV, XXVII. See *Dainese v. Hall*, 91 U. S. 13.

⁴ 34 Stat. at L. 814, § 4.

⁵ 7 Opin. Atty.-Gen. 495.

⁶ 11 Opin. Atty.-Gen. 474.

observing the Constitution of the United States.⁷ As formal indictment and trial by jury would usually be impracticable, Congress has not adopted the constitutional guaranties for the benefit of defendants before extra-territorial courts.

The exercise of this peculiar personal jurisdiction by these courts is simply the most practical means of insuring justice to our citizens in countries — Oriental or barbarous — where standards differ so essentially from ours that just trials of foreigners are impossible.⁸ When, however, a civilized nation annexes⁹ or assumes the protection¹⁰ of such countries, this objection disappears, and the United States abandons its extraterritorial jurisdiction. The same result is reached when an Oriental nation develops into a modern nation and establishes responsible courts, as in the case of Japan.¹¹ And, as between the United States and civilized nations, the jurisdiction of consular courts is confined to disputes arising between masters, officers, and crews of vessels belonging to the respective nations, when not breaches of the peace.¹²

THE NATURE OF THE INTEREST NECESSARY TO PERMIT AN OBJECTION TO THE CONSTITUTIONALITY OF A STATUTE. — Since the federal Constitution is the supreme law of the land, there is a general presumption that the governmental bodies have acted in conformity with it. A court will hesitate to declare a statute unconstitutional, since in doing so it necessarily decides that the legislature, either wilfully or negligently, has tried to usurp power denied to it by the people. Consequently, even when a constitutional point is squarely raised, if the court can decide the case on another ground, it will do so. In like manner a court will not listen to an objection to the constitutionality of an act, made by one whose rights are not directly affected by it. Thus the owner of the particular estate may not object to a statute which defeats the right of the remainderman.¹ Nor where a law excludes negroes from a grand jury may a white man object to such exclusion, since he is not prejudiced thereby.² And if one has consented to an invalid statute, as to the taking of property without compensation, he cannot later set up the unconstitutionality of the transaction.³ A more difficult problem arises when one questions the constitutionality of a statute in an official capacity. The question generally arises when application is made for a writ of *mandamus* to compel an official to perform his duty. It would clearly be disastrous if every petty official could, when the attempt was made to compel him to perform an administrative act, set up the defense of the unconstitutionality of the statute.⁴ On the other hand,

⁷ *In re Ross*, 140 U. S. 453.

⁸ By treaties with the following countries, the United States has extraterritorial jurisdiction in civil or criminal cases or both: Borneo, China, Muscat, Morocco, Persia, Siam, Tripoli, and Turkey.

⁹ Madagascar: For. Rel. 1897, 152-4.

¹⁰ British Protectorate of Zanzibar: 5 Moore, Dig. Internat. Law, 868-9.

¹¹ 2 Moore, Dig. Internat. Law, 660. The United States has promised to relinquish its extraterritorial rights when the condition of Chinese law warrants it in so doing. Treaty with China, Oct. 8, 1903, Art. XV.

¹² 5 Moore, Dig. Internat. Law, 128. Cf. *In re Wildenhuis*, 28 Fed. 924; *Tellefsen v. Fee*, 168 Mass. 188.

¹ *Sinclair v. Jackson*, 8 Cow. (N. Y.) 543.

² *Com. v. Wright*, 79 Ky. 22.

³ *Haskell v. New Bedford*, 108 Mass. 208. See 21 HARV. L. REV. 133.

⁴ See *United States v. Marble*, 3 Mackey (D. C.) 32.

each official has sworn to uphold the Constitution, and a court may well be reluctant to force him to do an act which may be in violation of his oath and detrimental to the rights of the people.⁵ Much depends, necessarily, upon the facts in each particular case. Where the validity of the statute appears to be doubtful, the great weight of authority is that the court will consider the defense.⁶ Especially is this true where the official will incur a personal liability if the statute is later declared invalid, as in the case of an auditor who is compelled to pay out money.⁷

When, however, a state official appeals from a state court to a federal court, a different problem is presented. The decision of the court of last resort of the state is binding on the Supreme Court of the United States unless a federal question is involved.⁸ In a recent case where a county court was prevented from levying a tax by virtue of a statute which it claimed to be unconstitutional, and where the constitutionality of the statute had been upheld by the highest court of the state, the federal Supreme Court refused to take jurisdiction on the ground that, since the appellant's interest was official and not personal, no federal question was involved. *Braxton County Court v. West Virginia*, 208 U. S. 192. Even though the official is liable for costs in the state suit, this pecuniary interest will not be sufficient to raise a federal question under the Fourteenth Amendment, since the liability for costs does not affect the merits of the case.⁹ It is believed that the same result would be reached, though the official might later become personally liable for his acts under the statute, as in the case of a tax-collector collecting under an unconstitutional law. Though the erroneous decision of the state court might prove disadvantageous to him, such a decision does not give him an appealable interest, since he is not directly affected.

LIABILITY FOR NEGLIGENT MISREPRESENTATIONS. — Whether or not an action can ever be maintained for the negligent use of language is a question on which there seems to be no conclusive authority. It is, however, raised squarely by a recent Ohio decision. A demurrer was sustained to a petition alleging that the defendant company was engaged in making abstracts of title to realty; that it was customary for purchasers of realty, even though under no contract relation with the defendant, to rely on these abstracts; and that the plaintiff was damaged by acting on a negligently defective abstract made by the defendant. *Thomas v. Guarantee Title & Trust Co.*, Circ. Ct. Cuyahoga Co., Nov. 18, 1907. It seems clear that the mere existence of a custom to rely on such abstracts is not sufficient basis for a contract relation¹ and that, in spite of some decisions which appear to leave the matter in doubt,² the plaintiff could not recover in an action for deceit.³ If the plaintiff is to recover, therefore, negligent use of language must be the basis of the action. It has been held that a lawyer is not liable for the results of a negligent mistake in a casual opinion given to one not a

⁵ *Van Horn v. State*, 46 Neb. 62.

⁶ See 6 Am. & Eng. Encyc., 2 ed., 1090.

⁷ *Denman v. Broderick*, 111 Cal. 96.

⁸ *Rasmussen v. Idaho*, 181 U. S. 198.

⁹ *Smith v. Indiana*, 191 U. S. 138.

¹ *Savings Bank v. Ward*, 100 U. S. 195. Cf. *Dickle v. Abstract Co.*, 89 Tenn. 431, allowing recovery where the defendant knew that the plaintiff would so rely.

² *Krause v. Busacker*, 105 Wis. 350.

³ *Peck v. Derry*, 14 App. Cas. 337. See 14 HARV. L. REV. 185.

client.⁴ Although that case can be distinguished on the ground that the plaintiff was not reasonable in relying on the opinion, there are dicta to the effect that no such action will lie.⁵ Nevertheless, from principles laid down in analogous cases it would seem that the demurrer in the present case should have been overruled.

The problem depends on whether or not there is a duty to use care as to the accuracy of representations. Undoubtedly such a duty does not exist under all circumstances, but a review of the decisions makes it equally certain that at times such a duty does exist. There may be a duty imposed by statute, as in the case of recording clerks. Then if the clerk negligently fails to record a mortgage, he is liable to a plaintiff who relied on the record to his damage.⁶ And apart from statute, in this country telegraph companies are considered to owe such a duty to the public that the recipient of a telegram may recover for losses caused by negligent mistakes made in transmission.⁷ The courts also find there is a breach of duty where the misrepresentation imperils the lives of others.⁸ An attempt has been made to confine the duty to use care in making representations to cases where "the act is one imminently dangerous to the lives of others or is an act performed in pursuance of some legal duty."⁹ Other decisions, however, show that this limitation is not sound. Physicians have been held liable to persons with whom there was no privity of contract for the results of negligent opinions which were not imminently dangerous to life.¹⁰ It has even been held that a druggist is similarly liable for negligently and falsely representing a hair tonic as harmless.¹¹ The position of the abstract company can be distinguished only on the ground that the damage caused is pecuniary instead of physical, and such a distinction seems untenable. In both cases the plaintiffs were reasonable in relying on the statement; in both the defendants knew persons such as the plaintiffs would rely on the statements and would probably be damaged if the statements were false. It is submitted, therefore, that a similar duty to use care should be imposed on the defendants in both cases.¹²

RECENT CASES.

ADMIRALTY — DECREES — CHANGE IN TITLE IN CONDEMNED PRIZE. — The plaintiff sued on a policy of marine insurance for loss of his ship by perils of the sea. The ship was captured during the Russo-Japanese war by a Japanese cruiser, but was wrecked on the Japanese coast before reaching port. Subsequently the wreck was condemned as a prize. *Held*, that the insured cannot recover, because the ship was lost by capture at the time of its seizure irre-

⁴ *Fish v. Kelly*, 17 C. B. (N. S.) 194.

⁵ See *Angus v. Clifford*, [1891] 2 Ch. 449, 470; *Le Lievre v. Gould*, [1893] 1 Q. B. 491, 501.

⁶ *Appleby v. State*, 45 N. J. L. 161.

⁷ *Western Union Tel. Co. v. Dubois*, 128 Ill. 248.

⁸ *Thomas v. Winchester*, 6 N. Y. 397. The defendant who negligently sold a dangerous drug as harmless was held liable to a third party with whom there was no privity of contract.

⁹ *Savings Bank v. Ward*, *supra*, 206. See 57 Am. Dec. 461, n.

¹⁰ *Edwards v. Lamb*, 69 N. H. 599; *Harriott v. Plimpton*, 166 Mass. 585.

¹¹ *George v. Skivington*, L. R. 5 Exch. 1.

¹² *Cf.* 14 HARV. L. REV. 184-99.

spective of whether the title which later passed by the sentence of condemnation related back to that time. *Andersen v. Marten*, 24 T. L. R. 208 (Eng., Ct. App., Dec. 18, 1907).

For a criticism of the fiction of relation of title on which the case was decided in the lower court, see 21 HARV. L. REV. 55.

BANKRUPTCY — POWERS AND DUTIES OF TRUSTEE — LIABILITY FOR NEGLIGENT FAILURE TO COLLECT OUTSTANDING ASSET. — A trustee in bankruptcy neglected to prosecute a disputed claim to goods of the bankrupt in the possession of another. A creditor excepted on this ground to the trustee's final account. *Held*, that the trustee, if found negligent, may be charged with the value of the goods. *In re Reinboth*, 157 Fed. 672 (C. C. A., Second Circ.).

The National Bankruptcy Act makes no express provision for charging a trustee for negligence. His neglect may be cause for removal or for withholding compensation. *In re Morse*, Fed. Cas. No. 9852; see *In re Newcomb*, 32 Fed. 826. And he is liable for loss to the estate caused by his negligent management. *In re Newcomb*, *supra*. His liability for negligently failing to get in an asset does not seem to have been passed upon before in this country; but such liability would naturally result from his duty to collect the property of the estate, under § 47a (2) of the Act. An English case, on similar facts, reaches the same result as the present decision. *Ex parte Ogle*, L. R. 8 Ch. 711. Moreover an administrator, or a trustee under a settlement, is liable for assets of the estate which he does not use ordinary diligence to collect. *Tuttle v. Robinson*, 33 N. H. 104; *Speakman v. Tatem*, 48 N. J. Eq. 136. A trustee in bankruptcy should be required to exercise a like degree of care. See *Speakman v. Tatem*, *supra*.

BANKRUPTCY — PROPERTY PASSING TO TRUSTEE — TRUSTEE'S RIGHT IN PROPERTY OF BANKRUPT SOLD FOR TAXES BEFORE ADJUDICATION — Before adjudication property of a bankrupt was sold for taxes. After the statutory period a deed was given without applying to the bankruptcy court or joining the trustee. *Held*, that the deed is void. *In re Epstein*, 156 Fed. 42 (C. C. A., Eighth Circ.).

If property has been put into a receivership, a tax deed thereof, though for taxes previously accruing, is void unless issued with the sanction of the court appointing the receiver. *Johnson v. Southern Building Ass'n*, 132 Fed. 540. But a master's deed, given in foreclosure proceedings instituted before the mortgagor became bankrupt, is good. *Eyster v. Gaff*, 91 U. S. 521. And if a pledgor gives the pledgee power to sell without notice and to buy himself, the pledgee may enforce it according to its terms, after the pledgor has been adjudicated bankrupt. *In re Mertens*, 144 Fed. 818. Neither the pledgee nor the mortgagee need apply to the bankruptcy court or join the trustee. In the present case it would seem that the court relied upon the cases as to receiverships and disregarded the closely analogous cases of the preëxisting mortgage or pledge of a bankrupt's property. A receiver has very broad powers and is appointed not merely to collect and distribute assets, but also to carry on the business; and a distinction seems possible between tax deeds of property in his control and of property in the hands of a trustee in bankruptcy.

BILLS AND NOTES — NEGOTIABILITY — "PAYABLE ABSOLUTELY." — The defendant, a joint-stock company, issued coupon bonds payable out of the assets of the association, the stockholders, however, to be free from liability upon them. *Held*, that the bonds are not non-negotiable as being payable only out of a particular fund. *Hibbs v. Brown*, 190 N. Y. 167.

For a discussion of this case in the lower court, see 19 HARV. L. REV. 616.

CARRIERS — CUSTODY AND CONTROL OF GOODS — LIABILITY OF CARRIER TRANSPORTING DANGEROUS ANIMALS. — The defendant was transporting trained bears in one of his steamboats. Before delivery to the consignee the plaintiff, while lawfully on the defendant's dock, was injured by one of the

bears. *Held*, that the rule imposing absolute liability on the keeper of animals *ferae naturae* does not apply to the defendant. *Molloy v. Starin*, 191 N. Y. 21.

If carriers were required to receive dangerous animals, they should not be under absolute liability for damage, since it seems unjust to impose an insurer's duty upon one who must assume a burden already perilous. *Cf. Jackson v. Baker*, 24 D. C. App. Cas. 100. It is settled, however, that carriers may refuse to accept freight of a dangerous character. *Cal. Powder Works v. A. & P. R. R. Co.*, 113 Cal. 329. The transportation of animals *ferae naturae* and of explosives is often necessary, and imposing absolute liability would act as an undesirable deterrent on carriers. Responsibility irrespective of negligence seems to have been imposed originally from a feeling that the keeping of such things was improper and was in itself an offense. *Muller v. McKesson*, 73 N. Y. 195. Mere temporary possession was sufficient, and carriers or bailees for any purpose have been charged regardless of caution. *Marsel v. Bowman*, 62 Ia. 57; *The Lord Derby*, 17 Fed. 265. The reasoning of the present decision, however, would relieve from liability many keepers for limited purposes, and in this seems justifiable; for public opinion no longer requires discrimination against keepers of ferocious beasts. *Cf. Marquet v. LaDuke*, 96 Mich. 596. Furthermore the result accords with the trend of modern American authority to do away with absolute liability in the use of land and of explosives. *Brown v. Collins*, 53 N. H. 442; *Sowers v. McManus*, 214 Pa. St. 244.

CARRIERS — DISCRIMINATION — DISTRIBUTION OF CARS. — In computing the distribution of its cars in a time of shortage, the defendant railroad failed to count the fuel cars sent to certain mines by foreign railroads to be filled for them. *Held*, that such fuel cars must be counted in determining the quota to be allotted each shipper. *R. R. Com. of Ohio v. The Hocking Valley Ry. Co.*, 12 Interst. C. Rep. 466.

Under the Interstate Commerce Act coal carriers must distribute their cars in proportion to the capacity of the mines of the district. *United States v. W. I. a. Northern R. Co.*, 125 Fed. 252; 25 STAT. AT L. 855. The method by which such quotas should be determined was considered in two recent cases. *United States v. B. & O. R. Co.*, 154 Fed. 108; *Logan Coal Co. v. Penn. R. Co.*, 154 Fed. 497. In both it was held that cars provided by a shipper should be counted as part of such shipper's quota, on the ground that the transportation of such cars occupied the railroad to the detriment of other shippers. Since it is the duty of the carrier to furnish vehicles of transportation, it is bound to subject a shipper who does not supply vehicles to no disadvantage. *Rice, Robinson and Winthrop v. Western N. Y. & P. R. Co.*, 3 Interst. C. Rep. 162. In one case the principle was not applied to foreign fuel cars. *United States v. B. & O. R. Co.*, *supra*. But the other case supports the present ruling. *Logan Coal Co. v. Penn. R. Co.*, *supra*. It is difficult to see any ground for making a distinction between the fuel cars and the individual cars. Under any other rule than that of the present case the carrier would be discriminating in favor of the mines to which fuel cars were sent.

CARRIERS — LIMITATION OF LIABILITY — BREACH OF CONDITION PRECEDENT AS AFFECTING EXEMPTION. — A ship having collided while docking, water entered and damaged the cargo between decks, and then, owing to a defect in the ship, continued into the hold and there damaged other goods. The charter-party exempted the owner from liability for accidents in docking. *Held*, that the charterer may recover only the damage due to the unseaworthiness. *The Europa*, [1908] P. 84.

This decision appears to go on the ground that the charterer having received substantial performance can now no longer treat the unseaworthiness as a breach of condition precedent. The court distinguishes a recent English case in which deviation, though assumed not to be the cause of the damage, was held to be such a breach of condition precedent as to deprive the shipowners of the contract exemption from liability. *Thorley, Ltd. v. Orchis S. S. Co., Ltd.*, [1907] 1 K. B. 660; see 20 HARV. L. REV. 325. But in that case the deviation

was in fact a possible cause of the damage. It has not therefore yet been held that breach of a condition precedent avoids the express limitations of liability, when the damage would have occurred if the condition had not been broken.

CHATTEL MORTGAGES — AFTER ACQUIRED PROPERTY — RIGHT TO OFFSPRING OF MORTGAGED ANIMALS. — The plaintiff claimed that a chattel mortgage of certain cows included the calves in gestation at the time the mortgage was executed, there being no reference in the mortgage to the increase. *Held*, that the mortgage gives only a lien, which does not attach to the calves. *Demers v. Graham*, 93 Pac. 268 (Mont.).

The general rule is that a chattel mortgagee has title, and so a mortgage on animals covers the increase, though not mentioned in the mortgage, on the principle *partus sequitur ventrem*. See 16 HARV. L. REV. 442. This rule weakens the effect of the recording laws, since an examination of the mortgage gives no actual notice of its extent. But in the few states where by statute or decision a chattel mortgage gives only a lien, it is often possible to change a result based on the mortgagee's title. Thus, contrary to the result in states passing title to the mortgagee, a tender of the amount due on a note, though made after maturity, discharges the lien on the chattel mortgage security. *Moore v. Norman*, 43 Minn. 428; *cf. Noyes v. Wyckoff*, 30 Hun (N. Y.) 466. So too the court is free to construe the lien as limited to the property actually described. The contrary view is a possible construction. *First Nat'l Bank v. Western Mtge., etc., Co.*, 86 Tex. 636. Thus a pledge is said to cover the increase. See JONES, PLEDGES, § 32. The view of the present case, however, is preferable, as it carries out the spirit of the registry laws. *Shoobert v. De Motta*, 112 Cal. 215.

CONFLICT OF LAWS — LEGITIMACY AND ADOPTION — LEGITIMATION SUBSEQUENT TO BIRTH. — A New York man deserted his wife and purported to marry a New Jersey woman, who bore him two children. Thereafter he became domiciled with his family in Michigan, obtained a divorce there from his New York wife by default without personal service, and went through a second marriage ceremony with the New Jersey woman. This divorce and remarriage a New York court by decree refused to recognize. By Michigan law illegitimate children become legitimate by the subsequent marriage of their parents. The children claimed New York realty under a devise as the "lawful issue" of their father. *Held*, that they are not entitled to the property. *Olmsted v. Olmsted*, 190 N. Y. 458.

For a criticism of this case in the lower court, see 20 HARV. L. REV. 400.

CONSIDERATION — THEORIES OF CONSIDERATION — ACCORD AND SATISFACTION BY PART PAYMENT. — The plaintiff in a suit for the balance of a note admitted that several partial payments had been made by the defendant. It was inferable that the defendant was insolvent when the last partial payment was made, and possible that she had consented to the sale of certain land. *Held*, that it was error to charge that an agreement to accept the payments in full satisfaction is no defense. *Frye v. Hubbell*, 68 Atl. 325 (N. H.).

Although this case may not squarely involve the doctrine formerly established in New Hampshire that an accord and satisfaction by payment of less than the whole debt is not valid, yet it is certainly intended to annul that doctrine and does not rest on any exception to be made on account of the insolvency of the debtor. Reliance is placed upon the general reluctant expressions of assent to the overruled doctrine and upon the argument of Professor Ames that it is unjust and arose in England through a misunderstanding. See *Foakes v. Beer*, 9 App. Cas. 605; 12 HARV. L. REV. 515; 13 *ibid.* 29. The various views of the nature of consideration are discussed in 8 HARV. L. REV. 27; 14 *ibid.* 496; 17 *ibid.* 71.

CONSTITUTIONAL LAW — CLASS LEGISLATION — ACT ALLOWING PRIVATE CLAIM AGAINST STATE. — Article III, § 19, of the Constitution of New York provides that the legislature shall not "allow any private claim against the

state." The state conveyed land to the plaintiff for value by letters patent, which, by express terms, should "in no case operate as a warranty of title." The title proving invalid, a special enactment conferred jurisdiction on the Court of Claims to determine the plaintiff's claim for damages and to enter judgment therefor. *Held*, that the enactment is constitutional although it authorizes a judgment for the plaintiff notwithstanding the lack of warranty. *Wheeler v. State of New York*, 190 N. Y. 406.

This decision affirms the decision of the lower court, commented upon in 18 HARV. L. REV. 465.

CONSTITUTIONAL LAW — PERSONAL RIGHTS — ACT REQUIRING WEEKLY PAYMENT OF EMPLOYEES OF CORPORATION IN MONEY. — A statute required corporations engaged in certain enumerated classes of business to pay their employees in money each week. *Held*, that the statute is constitutional. *Lawrence v. Rutland R. Co.*, 67 Atl. 1091 (Vt.).

The court seemingly relies on the state's reserved power to alter corporate charters, though it also mentions the quasi-public character of the corporations involved. The constitutionality of such legislation has been the subject of much conflict. It has been upheld variously as an exercise of the reserved power to amend, or of the broader police power. *State v. Browne, etc., Mfg. Co.*, 18 R. I. 16; *Opinion of the Justices*, 163 Mass. 589; *contra. Republic Iron & Steel Co. v. State*, 66 N. E. 1005 (Ind.). In reality the considerations justifying the exercise of these two powers seem the same; both, in essence, look to the interest of the public. The liberty to contract is fundamental, but it is neither absolute nor universal; in a conflict, inevitable at times, with the public welfare, the latter, if clear, is paramount. See *Frisbie v. United States*, 157 U. S. 160, 165. And it is not inconceivable that a "weekly payment" act, or a "truck" act, or a combination of the two, as in the present case, may be necessary because of local industrial conditions. See 19 HARV. L. REV. 62. That, of course, is a question of fact, and the sole concern of the court is with the reasonableness of the legislative determination of this question in the light of the conflict of rights.

CONSTITUTIONAL LAW — WHO MAY SET UP UNCONSTITUTIONALITY — OFFICIAL INTEREST NOT SUFFICIENT TO RAISE FEDERAL QUESTION. — A county court refused to assess a tax in accordance with a state statute. In *mandamus* proceedings the highest court of the state declared the statute to be constitutional. The county court appealed to the United States Supreme Court. *Held*, that since the interest of the appellant is official and not personal there is no federal question involved. *Braxton County Court v. West Virginia*, 208 U. S. 192. See NOTES, p. 438.

CONTEMPT — POWER TO PUNISH FOR CONTEMPT — POWER OF APPELLATE COURT TO PUNISH VIOLATION OF INJUNCTION PENDING APPEAL. — Pending an appeal from a judgment of the lower court granting a perpetual injunction, the defendant violated the decree. *Held*, that the appellate court is the proper tribunal to punish the contempt. *Menues v. Grimes Candy Co.*, 83 N. E. 82 (Oh.).

When an appeal is taken from a decree of the lower court dissolving an injunction and the upper court grants a *supersedeas* operating as a revival of the injunction, it has been held that the upper court should punish violations thereof. *State v. Bridge Co.*, 16 W. Va. 864. In that case it is the upper court which makes the injunction operative. But when a perpetual injunction has been granted in the lower court, the perfecting of an appeal, according to the great weight of authority, does not destroy the operative force of the injunction. *Leonard v. Osark Land Co.*, 115 U. S. 465. Pending such an appeal the upper court merely leaves the decree of the lower court in full force. *State v. Harness*, 42 W. Va. 414. By the appeal the lower court is merely deprived of the power to take further affirmative action. See *Sixth Ave. R. Co. v. Gilbert El. R. Co.*, 71 N. Y. 430. It may still take steps necessary to preserve the *status quo*. *Hinson v. Adrian*, 91 N. C. 372. Hence it would seem that

pending an appeal from the decree granting an injunction, the lower court is the proper tribunal to punish disobedience of the injunction. *State v. Dillon*, 96 Mo. 56.

CORPORATIONS — CORPORATE POWERS AND THEIR EXERCISE — EXTERIOR ADVERTISING ON PUBLIC OMNIBUS. — The plaintiff corporation maintained large, highly colored advertising signs upon the outside of its omnibuses. When threatened with interference by the city, the plaintiff sought to enjoin municipal action. *Held*, that an injunction will not be granted, as the plaintiff in engaging in exterior advertising is acting *ultra vires*. *The Fifth Avenue Coach Co. v. City of New York*, 38 N. Y. L. J. 1675 (N. Y., Sup. Ct., Jan. 1908).

The case presents a novel application of the doctrine of *ultra vires*. The franchises of public corporations are strictly construed and the courts are slow to allow them to indulge in subordinate undertakings which are not incidental to the prosecution of their main undertaking. See *Davis v. Old Colony R. R.*, 131 Mass. 258. While refreshment rooms in depots add to the convenience of passengers, they derive no benefit from exterior advertising, and to hold that the plaintiff has no such incidental power seems proper. *Pittsburgh, etc., Co. v. Seidell*, 6 Pa. Dist. 414. Advertising on station platforms, however, is justified on the ground of custom. See *Interborough R. T. Co. v. City of N. Y.*, 47 N. Y. Misc. 221. The court regrets its inability to treat the advertising as a nuisance. There is a marked tendency in recent cases to recognize public aesthetics as a basis for legal action. See 20 HARV. L. REV. 35. But as yet the use of private property has not been limited by prohibiting offensive advertisements. *City of Chicago v. Gunning System*, 214 Ill. 628. It is to be hoped that the courts will soon declare that the prohibition of unsightly advertising is as much within the police power as the prohibition of offensive noises and odors. See FREUND, POLICE POWER, § 182.

CORPORATIONS — DISTINCTION BETWEEN CORPORATION AND ITS MEMBERS — BINDING EFFECT ON STOCKHOLDERS OF CONTRACT MADE BY CORPORATION. — The X corporation with the assent of the individual defendants, its principal stockholders, sold all of its property, including good will, to the plaintiff, and covenanted that it would no longer engage in the same business. The individual defendants with others thereafter formed the defendant corporation, which proceeded to carry on that same line of business. *Held*, that neither the individual defendants nor the defendant corporation is precluded from so doing by the contract of the X corporation. *Donnell v. Herring, etc., Co.*, 208 U. S. 267.

For a discussion of this case in the lower court, see 20 HARV. L. REV. 223.

DAMAGES — MEASURE OF DAMAGES — LOSS OF USE OF AUTOMOBILE. — The plaintiff's automobile was damaged by the negligent act of the defendant, and the plaintiff was deprived of its use for three weeks while it was undergoing repairs. He was accustomed to use the car solely for purposes of health and pleasure. *Held*, that it is improper to admit evidence of the rental value of the machine. *Bondy v. New York City R. Co.*, 56 N. Y. Misc. 602.

The ordinary measure of damages in the case of injury to personal property is the expense of restoration, deterioration in value, and compensation for the loss of the use of the chattel. *Streett v. Laumier*, 34 Mo. 469; *Allen v. Fox*, 51 N. Y. 562. The plaintiff may recover for the deprivation of the use though he suffers no pecuniary loss thereby. *The Mediana*, [1900] A. C. 113. He is entitled to the use of his property and should be compensated for the loss of that use whether he would have gained a profit from it or enjoyed it himself. If the plaintiff had hired another automobile he could have recovered the reasonable expense of so doing. *Cf. Wellman v. Miner*, 19 N. Y. Misc. 644. It would seem to follow that if he chooses to do without a machine, he is entitled to compensation for the deprivation, which does not seem to be conjectural damage. In ascertaining the value of the use of a chattel, the rental value is proper evidence. *Chawwin v. Valiton*, 8 Mont. 451. The principal case, however, is in accord with a previous decision of the same court. *Foley v. Forty-Second St. R. Co.*, 52 N. Y. Misc. 183.

EQUITY — JURISDICTION — STIPULATION IN CONTRACT FOR RELIEF BY INJUNCTION. — The defendant contracted to sing in the plaintiff's troupe, one clause of the agreement being that the defendant's services were of so special a character that the plaintiff should be entitled, in case of breach, to enjoin the defendant's singing for any other person. *Held*, that the plaintiff is not entitled to an injunction. *Dockstader v. Reed*, 121 N. Y. App. Div. 846.

The refusal to grant an injunction in the present case seems a proper exercise of the court's discretion. For a discussion of the principles involved, see 21 HARV. L. REV. 368.

FEDERAL COURTS — JURISDICTION — WHAT CONSTITUTES A CONTROVERSY. — The complainants in a certain litigation had demanded payment of a debt due them and had been refused. The respondent, when sued, admitted all the allegations of the complainants' bill and joined in asking for a receiver for its property. The petitioner here sought to compel the circuit court to dismiss the complaint on the ground that there was no "controversy" between the parties as required by the statute defining the jurisdiction of the circuit court. 1 U. S. COMP. STAT., 507, 508. *Held*, that there was a controversy between the parties within the meaning of the statute. *Re Metropolitan Railway Receivership*, 208 U. S. 90.

Controversy does not include criminal cases, but only applies to civil suits. See *Matthews v. Noble*, 55 N. Y. Supp. 190. After a judgment has been paid and extinguished, no controversy remains upon which to predicate jurisdiction in an appellate court. *Dakota County v. Glidden*, 113 U. S. 222. Nor does one exist when the litigation is collusive, or controlled on both sides by the same person, or is based on a mere moot question not involving any right in the plaintiff. *Tenn., etc., Ry. Co. v. Southern Tel. Co.*, 125 U. S. 695; *Tyler v. Judges*, 179 U. S. 405. The court interprets "controversy" as meaning an unsatisfiable justiciable claim. The existence of the latter does not depend upon the nature of the defendants' reply, but upon some previously existing state of facts. For it is absurd to say that the defendant can conclusively show that the plaintiff has no such claim by a plea admitting his every allegation. The petitioner's contention that no controversy exists where no issue is raised by pleadings would prevent judgments by consent or by default in the federal courts, and would weaken the entire statute by leaving federal jurisdiction to the caprice of the defendant. In the only case found where this argument has been made, it was dismissed with slight consideration. See *Hickman v. B. & O. Ry. Co.*, 30 W. Va. 296, 299.

FEDERAL COURTS — RELATIONS OF STATE AND FEDERAL COURTS — RETENTION OF JURISDICTION AFTER TERMINATION OF RECEIVERSHIP. — A railroad, after making mortgages, issued unsecured bonds and later consolidated with another railroad on terms which were held by the state court to give the bondholders a lien on the equity of redemption. The federal court held that a lien was not created. Other consolidations and mortgages followed, and later a receiver was appointed by a federal court. After foreclosure of all the mortgages, the property was sold and delivered to the defendant, but the court reserved jurisdiction until all claims against the property should be fully paid, with power of resale on default. After this decree the plaintiff obtained a judgment and an order of sale from a state court. *Held*, that the state court was without power to decree a sale of the property. *Wabash R. R. Co. v. Adalbert College*, 208 U. S. 38. See NOTES, p. 433.

HUSBAND AND WIFE — PROPERTY ACQUIRED BY HUSBAND AND WIFE — APPLICATION OF DOCTRINE OF TENANCY BY ENTIRETIES TO PERSONALTY. — A husband and wife sold land owned by them as tenants by entireties, taking a mortgage and bond payable to husband and wife. The latter died, and afterwards the bond was paid. *Held*, that one half the proceeds belongs to the wife's legal representatives. *In re Baum*, 106 N. Y. Supp. 113 (App. Div.).

At common law a conveyance of land to husband and wife makes them each tenant of the whole with survivorship, and owing to the suspension of the wife's

individuality they can hold in no other way. *Stuckey v. Keefe's Ex'r*, 26 Pa. St. 397. Though statutes emancipating the wife made tenancy by entireties no longer the only possible tenancy on a grant to husband and wife, some courts still continue to construe such grants as formerly. *Fisher v. Provin*, 25 Mich. 347. Others, however, have abandoned that construction. *Cooper v. Cooper*, 76 Ill. 57. The rule, therefore, where established in the case of realty seems merely a survival, furnishing no vigorous analogy to govern personalty. Furthermore, equity never favored survivorships. *Petty v. Styward*, 1 Ch. Rep. 57. And since the married women's acts are founded on equity rules, it would seem that there should not be an exceptional rule as to survivorship between husband and wife in the case of personalty. There is a conflict, but the result of the principal case is justified. *In re Albrecht*, 136 N. Y. 91; *Wait v. Bovee*, 35 Mich. 425; *contra, Johnson v. Lusk*, 6 Cold. (Tenn.) 113. The cases opposed are founded on a presumed analogy to the case of realty.

ILLEGAL CONTRACTS — CONTRACTS AGAINST PUBLIC POLICY — PROMISE TO MARRY AFTER DEATH OF EXISTING WIFE. — The defendant promised to marry the plaintiff after the death of his wife, the plaintiff being aware that the defendant then had a wife. *Held*, that the contract is void as against public policy. *Wilson v. Carnley*, 24 T. L. R. 277 (Eng., Ct. App., Jan. 31, 1908).

This decision reverses the decision of the lower court, criticized in 21 HARV. L. REV. 58.

INTERNATIONAL LAW — NATURE AND EXTENT OF SOVEREIGNTY — EXTRATERRITORIAL JURISDICTION. — In an appeal from a judgment of the United States Court for China, the defendant maintained that the court was without jurisdiction because the offense charged was not a crime under the Act of June 30, 1906, establishing the court. *Held*, that, as the offense is a crime at common law within the meaning of the act, the court has jurisdiction. *Biddle v. United States*, 156 Fed. 759 (C. C. A., Ninth Circ.). See NOTES, p. 437.

INTERSTATE COMMERCE — CONTROL BY CONGRESS — REGULATION OF INDEPENDENT INTRASTATE CARRIER. — The Safety Appliance Act provides that carriers shall equip their cars used in moving interstate commerce with automatic couplers. The defendant company operated a narrow gauge road entirely within the state, independent of through traffic and joint rate arrangements with contiguous carriers. For every shipment, separate bills of lading were issued on local rates. A certain shipment from without the state was carried on a car unequipped with automatic couplers. *Held*, that the defendant company is engaged in interstate commerce and subject to the Safety Appliance Act. *United States v. Colorado & N. W. R. Co.*, 157 Fed. 321 (C. C. A., Eighth Circ.).

The case holds that the carriage of a package from a place of shipment without the state to its final destination cannot be divided into an interstate and intrastate journey by the efforts of an independent intrastate carrier seeking to maintain a position as such. It follows, therefore, that the final destination designated by the consignor gives the shipment a continuous interstate character. See 20 HARV. L. REV. 652. An opposite result would greatly narrow the scope of federal regulation of interstate commerce. For example, under the Wilson Act liquors carried into a state become subject to the police power thereof upon arrival. But the courts have held that arrival means the final destination reached, thus guarding the inviolability of interstate commerce, as such, to this point. *American Ex. Co. v. Iowa*, 196 U. S. 133. If the intrastate carrier could determine at what point these imports became part of the general state property and hence amenable to state control for confiscation or taxation, these decisions would seem ineffective. A contrary result has been reached by construing the Safety Appliance Act as applicable only to carriers within the provisions of the Interstate Commerce Act. *United States v. Geddes*, 131 Fed. 452. But on the unequivocal language of this statute, its application is rightly extended to all carriers handling interstate shipments.

INTERSTATE COMMERCE—INTERSTATE COMMERCE COMMISSION—COMMISSION'S POWER TO INTERROGATE.—In the course of an investigation the Interstate Commerce Commission interrogated the defendant with the object of ascertaining whether the directors of a railroad engaged in interstate business had expended its funds while the defendant was an officer of the railroad in buying stocks at inflated prices, or stocks that should not have been purchased. On refusal to answer, suit was instituted to compel him to do so. *Held*, that he be directed to answer. *Interstate Commerce Commission v. Harriman*, 157 Fed. 432 (Circ. Ct., S. D. N. Y.). See NOTES, p. 431.

LIBEL AND SLANDER—ACTS AND WORDS ACTIONABLE—DEFAMATION OF PLAINTIFF'S SISTER.—Under the title "Divided House of the M's" the defendant published that the plaintiff's sister had been arrested for larceny. *Held*, that it was error to sustain a demurrer to the plaintiff's suit for libel. *Merrill v. Post Publishing Co.*, 83 N. E. 419 (Mass.).

Ordinarily an action for defamation is confined to the person directly assailed. Libel of a partner in his private life is not libel of the partnership. *Haythorn v. Lawson*, 3 C. & P. 196. And no action is allowed for the slander of a deceased relative. *Wellman v. Sun Printing, etc., Ass'n*, 66 Hun (N. Y.) 331. It is true that suit for libel of a wife may be brought in the husband's name, but the action lapses on her death. See ODGERS, LIBEL AND SLANDER, 4 ed., 530. Moreover, defamation of a sister uttered in an action by the defendant against her brother has been held to give the brother no action for slander. *Subbaiyer v. Kristnaiyar*, 1 L. R. 1 Mad. 383. This case, however, was distinguished from the present case on the ground that the plaintiff's name was not there mentioned. A similar distinction has been made where a corporation sues for libel because of the defamation of its manager. *N. Y. Bureau of Information v. Ridgway-Thayer Co.*, 104 N. Y. Supp. 202. The distinction seems unsupportable since in each case the plaintiff's standing in the community is damaged. Hence to allow him to recover in an action of libel is extending the previous limits of the action and enlarging the absolute liability where no special damages need be proved. An action should lie, however, for actual damages proximately caused by the defendant's tort. See *Riding v. Smith*, 1 Ex. D. 91.

LIBEL AND SLANDER—ACTS AND WORDS ACTIONABLE—WORDS CHARGING INSTITUTION OF DIVORCE PROCEEDINGS.—The defendant falsely published that the plaintiff's husband had instituted a suit for divorce against the plaintiff in the New Jersey courts. A divorce may be granted in New Jersey for incompatibility of temperaments. *Held*, that the publication is libellous *per se*. *O'Neill v. Star Co.*, 121 N. Y. App. Div. 849.

In a similar case a co-respondent was named, and the imputation was therefore clearly defamatory. *Regina v. Leng*, 34 J. P. 309. But the present finding seems entirely reasonable notwithstanding the possible meaning of the publication under the New Jersey divorce law, and assuming that such meaning is not actionable. That the statement is merely capable of a special innocent meaning is not conclusive; words are no longer, as formerly, construed *in mitiori sensu*, but in the plain sense in which the rest of the world naturally understands them. See *Roberts v. Camden*, 9 East 93, 96. Nor should a presumption of knowledge of a technical sense of the words be raised to rebut their otherwise libellous character in the minds of right-thinking people. The presumption—or fiction—that every one knows the law cannot be pushed to such an extent. The same principle seems to be involved in those cases where it is actionable to charge acts commonly understood to be criminal, though they do not legally constitute a crime; for example, words imputing larceny of common property by a co-tenant are actionable *per se*. *Williams v. Miner*, 18 Conn. 464.

MANDAMUS—ACTS SUBJECT TO MANDAMUS—PERFORMANCE OF DUTIES IMPOSED BY STATUTE AUTHORIZING USE OF STREETS.—A city petitioned for *mandamus* to compel a telephone company to file a statement of its receipts and to pay a tax thereon, in accordance with a municipal ordinance granting

the use of the streets, which the company had accepted. *Held*, that *mandamus* does not lie. *City of Chicago v. Chicago Telephone Co.*, 82 N. E. 607 (Ill.).

Though ordinary contractual duties, even if owed to a state, are not enforceable by *mandamus*, duties imposed by municipal ordinances in granting to quasi-public corporations the use of streets are not contractual merely. *People v. Suburban R. R. Co.*, 178 Ill. 594. For, whether the grant is properly considered a franchise given by the municipality under authority delegated by the state, or, as in Illinois, a license sanctioned by the state, the duties are imposed as conditions of the grant of a public privilege and are legal obligations owed ultimately to the state. *Richmond, etc., Co. v. Brown*, 97 Va. 26; *Chicago, etc., Co. v. Town of Lake*, 130 Ill. 42. If, then, a relator seeks to enforce these duties by *mandamus*, the writ should be granted. *Richmond, etc., Co. v. Brown, supra*. For, even according to the early definition of *mandamus*, it lay for the enforcement of legal obligations imposed by statute or charter. *King v. Wheeler*, Cas. t. Hardw. 99. And the application of *mandamus* has been greatly extended. *Rex v. Barker*, 3 Burr. 1265; *American, etc., Co. v. Haven*, 101 Mass. 398. According to the modern notions, benefit to the general public from performance, it is submitted, is a circumstance in showing that obligations are enforceable by *mandamus*. But the present case reaches its erroneous conclusion by making such benefit the determining circumstance.

NEGLIGENT MISREPRESENTATION — NEGLIGENTLY PREPARED ABSTRACT OF TITLE. — The plaintiff alleged that the defendant company was engaged in making abstracts of title to realty; that it was customary for purchasers of realty, even though under no contract relation with the defendant, to rely thereon; and that the plaintiff was damaged by acting on a negligently defective abstract made by the defendant. The defendant demurred. *Held*, that the demurrer be sustained. *Thomas v. Guarantee Title & Trust Co.*, Oh., Circ. Ct. Cuyahoga Co., Nov. 18, 1907. See NOTES, p. 439.

NEW TRIAL — GROUNDS FOR GRANTING NEW TRIAL — MOTION ON GROUND OF NEWLY DISCOVERED EVIDENCE UNACCOMPANIED BY AFFIDAVIT OF WITNESS. — On a motion for a new trial on grounds of newly discovered evidence the applicant produced the affidavit of a person other than the witness as to statements made by a non-resident witness who had refused to make an affidavit. *Held*, that it is error to refuse to consider it. *Soebel v. Boston Elevated Ry. Co.*, 83 N. E. 3 (Mass.).

As the question involved is not the truth of certain evidence but its existence, and as no question of what should or should not be admitted at the trial is involved, the ordinary hearsay rule does not here apply. *Lansky v. West End St. Ry. Co.*, 173 Mass. 20; *contra, Sheppard v. Sheppard*, 10 N. J. L. 250, 254. In general, the facts upon which the motion is based must be shown by the best evidence. Therefore the affidavit of the witness from whom the newly found evidence is expected must ordinarily accompany the motion. *Cardell v. Lawton*, 16 Vt. 606. But the rule is subject to exceptions within the discretion of the court. And if the absence of such an affidavit can be satisfactorily accounted for, as where the witness is out of the state, and his affidavit cannot be obtained, any evidence that will convince the court that he can give important new testimony may be shown. *Smith v. Cushing*, 18 Wis. 295; *Read v. Staton*, 3 Hayw. (Tenn.) 159. Under these circumstances hearsay is admissible, and the affidavit of one who has heard the statements of the witness may be received. *Eddy v. Caldwell*, 7 Minn. 225.

PUBLIC OFFICERS — DE FACTO OFFICERS — VALIDITY OF ACTS WHERE NO DE JURE OFFICE. — The plaintiff was discharged from the police force by a police board created by a statute later declared unconstitutional. He now seeks reinstatement on the ground that the acts of its incumbents could not be valid as those of *de facto* officers, since there was no *de jure* board. *Held*, that he is not entitled to reinstatement. *Lang v. Mayor of Bayonne*, 68 Atl. 90 (N. J. Ct. Err. and App.).

This case overrules an earlier case. *Flaucher v. Camden*, 56 N. J. L. 244. Further, it disapproves of the doctrine laid down by the Supreme Court of the United States. *Norton v. Shelby County*, 118 U. S. 425. For a discussion of the principles involved, see 21 HARV. L. REV. 153; 20 *ibid.* 580.

RESTRAINT OF TRADE — SHERMAN ANTI-TRUST LAW — LIABILITY OF LABOR UNIONS. — The plaintiffs ran a non-union factory. The defendants, members of the Union Hatters of America and the American Federation of Labor, in an attempt to force the plaintiff to employ only union men, boycotted his goods and destroyed his business, which was largely interstate. *Held*, that the defendants' acts constitute a combination in restraint of interstate trade, made illegal by the Sherman Anti-Trust Act of 1890, and that the plaintiff, by § 7 of the Act, can recover threefold damages for the injury to his business. *Loewe v. Lawlor*, 208 U. S. 274.

By the better opinion boycotts are actionable at common law. See 20 HARV. L. REV. 429, 450. The present case is noteworthy in deciding for the first time that the person injured by a boycott which is in restraint of interstate commerce has the added remedy of a recovery of threefold damages. The court has already decided that a conspiracy in trade to refuse to sell to a retailer unless he conforms with certain restrictions is an illegal restraint under the Act. *Montague & Co. v. Lowry*, 193 U. S. 38. The present decision merely applies the same principles to labor combinations. It therefore introduces no new principles, and the court could consistently have reached no other result without exempting labor unions from the law. And a combination of consumers to interfere with the interstate trade of any producer would likewise seem illegal, regardless of the motive. As the decision allows recovery against the individual members of the union, it seems to show the attitude of the court upon the question of the responsibility of individual members of a labor union for damages caused by strikes and other labor troubles.

RESTRICTIVE AGREEMENTS AS TO USE OF PROPERTY — COVENANT AGAINST EXERCISING TRADE — COVENANT TAKEN FOR PURPOSE OF ESTABLISHING MONOPOLY. — The owner of a large tract of land on which a town was situated divided it into lots and conveyed them to different purchasers by deeds containing covenants by the vendees not to engage in the sale of intoxicating liquors. His main purpose was to protect his own saloon from competitors. *Held*, that the covenants are void as creating a monopoly. *Burdell v. Grandi*, 92 Pac. 1022 (Cal.).

It is well settled that a covenant not to carry on a certain business on the land sold is enforceable. *McMahon v. Williams*, 79 Ala. 288. But where it is part of a general scheme to create a monopoly, a distinct question of public policy is presented. The older view was that an owner of land had an absolute right to dispose of it in any way. *Holmes v. Martin*, 10 Ga. 503; *Morris v. Tuscaloosa Mfg. Co.*, 83 Ala. 565. The modern rule is that he must not exercise his right so as to injure the public, and that if restrictive covenants create a monopoly they are void. *Chippewa Lumber Co. v. Tremper*, 75 Mich. 36. The result of enforcing the covenants in the present case would be to confine the whole town's source of supply of liquor to one man. In the case of most commodities the restriction should not be enforced. But it seems better public policy to restrict the sale of liquor than to encourage its use, and as the question is one of public policy only, the monopoly might well be allowed. See *Watrous v. Allen*, 57 Mich. 362.

TAXATION — PARTICULAR FORMS OF TAXATION — TIME OF ACCRUAL OF RIGHT OF STATE TO INHERITANCE TAX. — A resident of Massachusetts died intestate leaving personal property in both Massachusetts and New York to be distributed to a brother and certain nephews and nieces. Under a New York statute the shares of the nephews and nieces were subject to an inheritance tax, while the brother's share was exempt. To avoid the tax on the non-exempt shares the administrator elected to apply the New York assets to the payment of the brother's distributive share. *Held*, that he is liable for the tax, since the

right of the state to a tax on the shares of non-exempt distributees vests on the death of the intestate. *Matter of Ramsdill*, 190 N. Y. 492. See NOTES, p. 435.

TORTS — INTERFERENCE WITH BUSINESS — CONTRACT RIGHTS. — The plaintiff supplied phonographic goods to A and B, who contracted not to sell to dealers who were on the plaintiff's suspended list. The defendant company, which was on the list and knew of the contracts, persuaded A, and by fraud procured B, to sell to it. The plaintiff sought damages and an injunction to prevent the defendant from procuring further sales by A and B. *Held*, that no action lies against the defendant for persuading A to sell, but that it may be enjoined from procuring sales by fraud. *Nat'l Phonograph Co. v. Edison-Bell Con. Phonograph Co.*, [1908] 1 Ch. 335.

This case reverses in part the decision of the lower court that the plaintiff's action was not maintainable, criticized in 20 HARV. L. REV. 656.

USURY — NATURE AND VALIDITY OF USURIOUS CONTRACT — APPLICATION OF FEDERAL STATUTE TO STATE BANK BUYING INSTRUMENT ORIGINALLY USURIOUS. — § 5198 of the U. S. Compiled Statutes, 1901, provides that, though a national bank knowingly charges a usurious rate, the instrument shall not be void. N. Y. Laws, 1837, c. 430, § 1, provided that all instruments charging a usurious rate should be void; but N. Y. Laws, 1892, c. 689, § 55, provided that state banks should be subject to the same usury laws as national banks. A note was made by the defendant at a usurious rate to a payee not a bank. It was later bought at a legal rate and sued on by a state bank which knew of the usury. *Held*, that there can be no recovery. *Schlesinger v. Lehmaier*, 191 N. Y. 69.

If a bank takes a usurious note as payee, whether in good or bad faith, or if it purchases a note without knowledge of its usurious character, the note can be enforced. *Farmers', etc., Bank v. Dearing*, 91 U. S. 29; *Schlesinger v. Gilhooly*, 189 N. Y. 1. This case of a purchase with knowledge seems the one instance where the ordinary state usury laws have been held a defense to negotiable paper owned by a bank. For a discussion of the case in a lower court, see 20 HARV. L. REV. 581. Cf. 21 HARV. L. REV. 136.

WILLS — CONSTRUCTION — ADMISSIBILITY OF EXTRINSIC EVIDENCE TO SHOW TESTAMENTARY INTENT. — A executed a warranty deed to B, but never delivered it. The document fulfilled the formal requirements of the statute of wills, but evidenced no *animus testandi*. It was placed in an envelope with A's will. *Held*, that extrinsic evidence is inadmissible to prove that the deed was executed with testamentary intent. *Noble v. Fickes*, 82 N. E. 950 (Ill.).

No set form is required for wills. A paper drawn as a deed is entitled to probate if it plainly expresses the testamentary intent and fulfills the statutory requirements. *Lincoln v. Felt*, 132 Mich. 49. But the mere fact that it is inoperative *inter vivos* does not make it a will. *Estate of Skerrett*, 67 Cal. 585. Where an instrument through its ambiguity may be construed as either a will or a deed, extrinsic evidence is admissible to prove the maker's intent. *Robertson v. Dunn*, 2 Murph. (N. C.) 133. Even where the words are unequivocally those of a deed, the English courts admit parol evidence to prove an *animus testandi*. *Goods of Slinn*, L. R. 15 P. D. 156. The only American decision found repudiates this doctrine on the ground that it transgresses the parol evidence rule. *Clay v. Layton*, 134 Mich. 317. The choice between the two doctrines rests on policy. The English decisions offer a great opportunity for fraud and mistake, while the present case utterly disregards the actual intention of the deceased. However, the general policy of the law as to wills, restricting parol testimony to the narrowest possible limit, favors the decision.

WILLS — CONSTRUCTION — GIFT BY IMPLICATION. — A testator devised his residuary estate to his step-mother and to his sister in equal shares, and provided that if either died without issue surviving, her share would go to the survivor. The mother died before the testator, leaving a grandchild, and her

daughter, the other residuary legatee. *Held*, that there is no gift by implication to the grandchild, and, since the condition on which the gift over was to take place has not happened, the gift lapses. *Matter of Disney*, 190 N. Y. 128.

A testamentary gift will be implied without formal words if there is a strong probability that such was the testator's intention. Thus a devise to B and his heirs after the life of A gives by implication a life estate to A when B is the testator's heir, but not when B is a stranger. *Dashwood v. Peyton*, 18 Ves. 27, 40. Further, if the gift is to A for life, and if A dies without issue, to B, a gift to A's issue has been implied. *Dowling v. Dowling*, 1 Eq. Cas. 442; *contra*, *Monypenny v. Dering*, 7 Hare 568. In the present case the court decided that the testator meant the residuary legatees to take absolutely if they survived him, and that the gift over could take place only in case one legatee died without issue before the testator. But if this interpretation is correct the testator probably meant that the issue should take. The decision imputes to the testator the extraordinary intention that the survivor shall take if the other legatee dies without issue, but if there is issue there shall be an intestacy.

WILLS — CONSTRUCTION — RELATION OF MISTAKE TO THE PROBLEM OF INTERPRETATION. — A testator who owned the east half of a certain quarter section of land but did not own the whole of the north half, devised the north half of that quarter section under circumstances which showed his intent to devise the east half. *Held*, that the court may strike out the false words of description and construe the equivocal description which remains as a devise of the land which the testator owned. *Felkel v. O'Brien*, 83 N. E. 170 (Ill.). See NOTES, p. 434.

WILLS — EXECUTION — "SIGNED AT THE END THEREOF." — A statute required that every will should be signed at the end thereof. The printed form upon which a testatrix wrote her will reserved a blank line for the signature. Beneath this line was a printed attestation clause, the recital of which contained a blank space for the name of the maker. The testatrix signed her name only in this latter space. *Held*, that the will is not signed at the end and is therefore invalid. *Sears v. Sears*, 82 N. E. 1067 (Oh.).

It appears to be settled that, unless there is express incorporation by reference, a will is not signed at the end if any part of a disposing clause follows the signature. *Matter of Andrews*, 162 N. Y. 1. If, however, the clause which follows the signature does not affect the construction of the will or the rights of the beneficiaries, the signature may properly be considered to be at the "end" of the will. *Baker v. Baker*, 51 Oh. St. 217; see *Ward v. Putnam*, 85 S. W. 179 (Ky.); *Wineland's Appeal*, 118 Pa. St. 37. It is immaterial whether the recitals of the attestation clause precede or follow the signature. *Younger v. Duffie*, 94 N. Y. 535. The statute does not forbid blank spaces in the body of a will. If, therefore, the signature follows the attestation clause, the will is properly signed although a space set apart to receive the signature has not been filled. *Morrow's Estate*, 204 Pa. St. 479. It seems to follow that if the present case is to be supported, it must be on the ground that the reason and policy of the statute demand that the signature shall be placed in such an independent position as to indicate clearly an intention to execute the instrument. See *Matter of Booth*, 127 N. Y. 109; but see *Matter of Noon*, 31 N. Y. Misc. 420.

WILLS — PROBATE — CONTEST BY STATE. — The State of Tennessee, claiming the right of escheat, attempted to contest the will of one who had died without heirs. *Held*, that the state may make such a contest. *State v. Lancaster*, 105 S. W. 858 (Tenn.).

At common law the lord took escheated land, not as successor or heir of the tenant, but as the owner who had granted it on terms that had expired. The lord's right, therefore, was proprietary, not prerogative, and title vested immediately on the death of the tenant. See *Doe v. Redfern*, 12 East 96. By the abolition of tenure in the United States, the sovereign's right to escheated land is the same as that to *bona vacantia*. But, by the weight of authority, this right

is also by title paramount and not by succession as *ultimus haeres*. *In re Barnett's Trusts*, [1902] 1 Ch. 847; but see *Megit v. Johnson*, 2 Dougl. 542. But though technically not an heir, the state is a party interested in setting aside a will when the decedent leaves no heir nor kin. This interest should be sufficient in equity to support a contest, and thus defeat the fraud of one who has procured a will to be made in his favor, or prevent succession under an invalid testament. *Contra*, *Hopf v. State*, 72 Tex. 281; but *cf. In re Miner's Estate*, 143 Cal. 194; *Gombault v. Public Adm.*, 4 Bradf. Sur. (N. Y.) 226. And on this broad ground even the feudal lord could institute a contest. See *Davis v. Davis*, 2 Add. Eccl. 223.

BOOKS AND PERIODICALS.

I. LEADING LEGAL ARTICLES.

SERVICE OF PROCESS ON CORPORATIONS. — Due process of law, under the Fourteenth Amendment, requires that the court have jurisdiction¹ and that the defendant receive reasonable notice.² Personal jurisdiction must be founded on actual personal service within the state, on constructive service on residents, or on consent.³ A corporation cannot literally be served in person, though service within the state on the officers of a domestic corporation may be considered actual service.⁴ Otherwise corporations must be served constructively, as provided by the statutes of the various states.⁵ In general, the validity of such service is said to be due to the allegiance of domestic corporations and to the consent of foreign corporations.⁶ Assuming the correctness of the foregoing statements, Mr. W. A. Coumts devotes a recent article to several interesting related problems. *The Constitutionality of Statutes Authorizing Subservice of Process upon Corporations*, 66 Cent. L. J. 109 (February, 1908).

It has apparently never been held that service on any agent of a corporation, clearly permitted by statute, was invalid on account of the subordinate or unrepresentative character of the agent, and the consequent insufficiency of notice. The cases turn on the construction of statutes; their constitutionality is not questioned. However, the dicta of two important tribunals indicate that a statutory method of service may be unconstitutional on the ground of insufficiency of notice;⁶ and in the case of a domestic corporation a statute providing for service through a state official in no way connected with the corporation has been held unreasonable and therefore unconstitutional.⁷ Mr. Coumts, recognizing this authority, nevertheless suggests that a domestic corporation by incorporating, or a foreign corporation by entering the state and doing business therein, under a statute which provides for an unreasonable method of service, waives the unconstitutionality of the statute. For this doctrine he cites no cases. It is true that a domestic corporation which had accepted benefits under a franchise was not allowed to question the constitutionality of the grant;⁸ but that is far from saying that incorporation works a waiver or an estoppel in regard to any law concerning corporations which happens at the time to be on the statute books. Domestic corporations, independently of any question of consent, are held as residents to be amenable to any reasonable

¹ See *Pennoyer v. Neff*, 95 U. S. 714.

² *Roller v. Holly*, 176 U. S. 398.

³ *Cf. Gaskell v. Chambers*, 26 Beav. 252.

⁴ See statutes collected in Beale, *For. Corp.*, c. 7.

⁵ *Ibid.*, § 261 ff.

⁶ See *Conn. Mut. Life Ins. Co. v. Spratley*, 172 U. S. 602; *Lake Shore, etc., R. Co. v. Hunt*, 39 Mich. 469.

⁷ *Pinney v. Providence Loan, etc., Co.*, 106 Wis. 396.

⁸ *New York v. Manhattan R. Co.*, 143 N. Y. 1.

method of constructive service.⁹ But, as already intimated, one case requires that the method be reasonable.⁷

A foreign corporation, not being a resident¹⁰ or capable of actual personal service within the state,¹¹ can be served constructively only by consent. If this consent is express, though it is imposed as a condition precedent to the right to do business in the state, yet it is a true submission to the kind of service prescribed, however unreasonable, and doubtless the unreasonableness should not later be urged, though this point has never been decided.¹² The state cannot exclude a foreign corporation because it fails to comply with a condition repugnant to the Constitution,¹³ or the principles of natural justice;¹⁴ but the corporation having once complied and expressly consented to service, jurisdiction is perfected, and there remains no constitutional objection. This reasoning seems preferable to the author's theory of a waiver of constitutional rights, by which he reaches the same result. When, however, a foreign corporation fails to file express consent to the statute, but does business in the state, the courts take jurisdiction on the ground of implied consent;¹⁵ that is, the corporation which has entered is not allowed to deny that it complied with the condition precedent to its right to enter.¹⁶ The Supreme Court has lately held that this constructive consent, or estoppel to deny actual consent, does not arise when the condition is unreasonable with regard to the particular cause of action involved.¹⁷ The same principle should apply if the statute was unreasonable on any other ground. Mr. Coutts does not observe this distinction between the cases of actual and implied consent. He maintains that service by publication on a foreign corporation ought to be as valid, if consented to, as any other mode of service. One case not cited in the article holds that such service is proper, if the consent is express.¹⁸ Mr. Coutts fails to note that in the cases¹⁹ which he cites as opposed to his opinion the only possible consent was constructive, and therefore the court might well decide that, the method of service being unreasonable, the consent would not be implied.

In considering in an analogous situation the liability of a foreign corporation which has ceased to do business in the state, Mr. Coutts argues that an agreement in advance to waive constitutional rights is void,²⁰ and hence the foreign corporation is not bound by its previous submission to an unconstitutional statute. He does not find this objection in the case where the corporation continues to do business; for there the act of consent, namely, the doing of business, continues to the time of service and concurs with the service. But a simpler view would be to regard the continuing or cessation of business as a circumstance to be considered in construing an express consent as revocable or not,²¹ irrespective of the reasonableness of the statute, or in raising a constructive consent when the statute is reasonable.

⁹ *Hinckley v. Kettle River R. Co.*, 70 Minn. 105.

¹⁰ *Beale, For. Corp.*, § 73.

¹¹ *Ibid.*, § 74. In some jurisdictions a foreign corporation doing business is considered "found" for purposes of service of process, without the aid of any principle of consent. *Haggin v. Comptoir d'Escompte*, 23 Q. B. D. 519. See 6 *Thompson, Corp.*, § 7989.

¹² In general an agreement to waive service is a valid basis of jurisdiction. *Kingman v. Paulson*, 126 Ind. 507.

¹³ *Blake v. McClung*, 172 U. S. 239.

¹⁴ See *La Fayette Ins. Co. v. French*, 18 How. (U. S.) 404.

¹⁵ *Funk v. Anglo-Am. Ins. Co.*, 27 Fed. 336.

¹⁶ This reasoning is criticized in *Beale, For. Corp.*, § 267; but, whether the statute provides for service on an agent of the corporation or on a state official, it seems difficult to distinguish implied consent from a principle in the nature of estoppel.

¹⁷ *Old Wayne Mut. Life Ass'n v. McDonough*, 204 U. S. 8; 20 *HARV. L. REV.* 572.

¹⁸ *Mohr & Mohr Distilling Co. v. Firemen's Ins. Co.*, 10 *Wkly. L. Bul. (Oh.)* 82.

¹⁹ *Tillinghast v. Boston, etc., Co.*, 39 S. C. 484; *Toms v. Richmond, etc., Co.*, 40 S. C. 520.

²⁰ *Citing Home Ins. Co. v. Morse*, 87 U. S. 445.

²¹ See *Beale, For. Corp.*, § 281; 19 *HARV. L. REV.* 52.

THE POWER OF CONGRESS TO LEVY TAXES FOR PURPOSES OF REGULATION. — Though the interpretation of the clause of the Constitution which gives Congress the power to levy taxes has been the subject of much discussion, a recent article deals with an aspect of the question on which there is comparatively little authority. *May Congress Levy Money Exactions, Designated "Taxes," Solely for the Purpose of Destruction?* by John Barker Waite, 6 Mich. L. Rev. 277 (February, 1908). The author bases his discussion on the case of *McCray v. United States*,¹ in which it was contended that a tax² on oleomargarine colored to resemble butter was invalid because, while on its face the act was an exercise of the power to raise revenue, its enforcement would in fact destroy or materially restrict the manufacture of artificially colored oleomargarine. The court, influenced somewhat, it would seem, by the fact that it considered the imposition a valid exercise of the police power,³ held that the taxing power was unlimited save as expressly stated in the Constitution, and that "if a tax be within the lawful power, the exertion of that power cannot be judicially restrained because of the results to arise from its exercise."⁴ If this reasoning is carried to its logical conclusion the agitation for state action in regard to patent medicines and for the proposed law prohibiting the interstate transportation of the products of child labor is uncalled for, since Congress can control these matters by prohibitive impositions in the form of taxes. Mr. Waite, however, ably contends that though the taxing power of Congress is broad, the Constitution does not give Congress "a power of control, as such, by money exactions, over affairs whereof jurisdiction is not otherwise conferred." There is, he argues, a difference between impositions for revenue and impositions for regulation, and the latter, properly speaking, are not taxes. Accordingly regulations of internal affairs are not within the power of Congress, since there is no express grant of such power in the Constitution. It is true that the courts have sustained⁵ a so-called tax clearly intended to drive out of circulation the notes of state banks, and that prohibitory duties on imports are considered constitutional. But the imposition on the state bank notes was valid under the express power to regulate the national currency, and the prohibitory duties may be regarded as an exercise of the power to regulate commerce. There seems to be no square decision, therefore, in support of the proposition that Congress was granted power to levy money exactions for purposes of regulation, and the author concludes that the act considered in the case of *McCray v. United States* was an abuse of congressional power.

This conclusion seems eminently sound. But it raises a further question, not considered by Mr. Waite, — whether it is within the power of the courts to determine the validity of an imposition from its effect as a tax or as a regulation, or whether an imposition for the purpose of regulation is an instance of "unconstitutional action by the representatives of the people which can be reached only through the ballot-box."⁶ On this question there seems to be no direct authority. An analogy, however, may be found in the general rule that under the police power the validity of an act may not be questioned in the absence of anything on its face which within the court's judicial knowledge is unwarranted.⁷ Similarly, while it is settled that taxation must be for public purposes,⁸ the absence of all possible public interest must be clear before the courts will declare the act invalid,⁹ and it is said that the "interest, wisdom and justice of the representative body furnish the only security, where there is no express contract, against unjust and excessive taxation."¹⁰ These decisions show the

¹ 195 U. S. 27.

² 32 Stat. at L. 193.

³ *McCray v. United States*, 195 U. S. 27, 63.

⁴ *McCray v. United States*, *supra*, 59.

⁵ *Veazie Bank v. Fenno*, 8 Wall. (U. S.) 533.

⁶ Cooley, *Const. Lim.*, 7 ed., 697.

⁷ *Powell v. Pennsylvania*, 127 U. S. 678; 17 HARV. L. REV. 269.

⁸ *Cole v. La Grange*, 113 U. S. 1.

⁹ *City of Minneapolis v. Janney*, 86 Minn. 111.

¹⁰ See *Bank v. Billings*, 4 Pet. (U. S.) 514, 563; 21 HARV. L. REV. 277.

tendency of the courts to consider that "it is not a part of their functions to conduct investigations of facts entering into questions of public policy merely, and to sustain or frustrate the legislative will embodied in statutes as they may happen to approve or disapprove its determination of such questions."¹¹ Applying these principles it would seem that theoretically an imposition for purposes of regulation is unconstitutional, but that as a matter of practice the courts will be slow to hold such impositions invalid.

The magazine which has been known heretofore as the American Law Register appeared in January, 1908, as The University of Pennsylvania Law Review. In future it will be referred to in these columns as U. P. L. Rev.

AUTOMOBILE, THE STATUS OF THE. *H. B. Brown*. Contending that the law should require a higher degree of care from automobile drivers, and punish their negligence more severely. 17 Yale L. J. 223.

BANK SHAREHOLDER'S RIGHT OF INSPECTION. *Anon.* Collecting the New York cases and showing that the allowance of the right is still largely discretionary with the court. 25 Bank. L. J. 17.

BANKRUPTCY ACT, PROPOSED AMENDMENTS TO THE NATIONAL. *Anon.* 5 Law & Com. 525.

CONSTITUTION AND OBSCENITY POSTAL LAWS, THE. *Theodore Schroeder*. Maintaining that it is unconstitutional to keep obscene literature out of the mails. 69 Alb. L. J. 334.

CONSTITUTIONALITY OF STATUTES AUTHORIZING SUBSERVICE OF PROCESS UPON CORPORATIONS. *W. A. Couitts*. 66 Cent. L. J. 109. See *supra*.

CONTEMPT, THE LAW OF, IN INDIA. *Sarat Chandra Lahiri*. 17 Madras L. J. 387.

CONTRABAND OF WAR. *W. R. Kennedy*. Showing the inadequacy of present rules on the subject. 24 L. Quar. Rev. 59.

ELEVENTH AMENDMENT, THE. *Herbert S. Hadley*. Contending that a federal court cannot enjoin an official act of a state officer. 66 Cent. L. J. 71.

ENGLISH CONSTITUTION, ORIGIN OF THE. I. *George Burton Adams*. Tracing the origin to feudalism and the feudal contract enunciated in the Magna Charta. 13 Am. Hist. Rev. 229.

INDEPENDENT CONTRACTOR UNDER THE LAW OF ILLINOIS, THE. *Barry Gilbert*. Collecting the Illinois decisions. 2 Ill. L. Rev. 361.

INDUSTRIAL PEACE LEGISLATION IN CANADA. *John King*. Discussing the practical working of the Industrial Disputes Investigation Act of 1907. 19 Green Bag 694.

INITIATIVE AND REFERENDUM, IS A PROVISION FOR THE, INCONSISTENT WITH THE CONSTITUTION OF THE UNITED STATES? *W. A. Couitts*. 6 Mich. L. Rev. 304.

INTERNATIONAL LAW, THE DEVELOPMENT OF, BY THE SECOND HAGUE CONFERENCE. *Edward G. Elliott*. 8 Colum. L. Rev. 96.

LEGAL ETHICS, THE PROPOSED AMERICAN CODE OF. *George P. Costigan, Jr.* 20 Green Bag 57.

LICENCES, PROPERTY IN. *Ernest E. Williams*. 24 L. Quar. Rev. 49.

PERPETUITIES, THE RULE AGAINST. *Anon.* Summarizing the principal applications of the rule and collecting the Pennsylvania authorities. 12 The Forum 131.

POLICE POWER, ITS IMPORTANCE AND DEVELOPMENT. *Philo Hall*. 15 L. Stud. Helper 360.

SALES, THE LAW OF, IN THE UNITED STATES. *Richard Brown*. Commenting from a Scottish point of view on Professor Williston's draft for a uniform Sales Act. 8 Colum. L. Rev. 82.

SECOND HAGUE CONFERENCE, THE WORK OF. *W. F. Dodd*. 6 Mich. L. Rev. 294.

"TAXES," MAY CONGRESS LEVY MONEY EXACTIONS, DESIGNATED, SOLELY FOR THE PURPOSE OF DESTRUCTION? *John Barker Waite*. 6 Mich. L. Rev. 277. See *supra*.

VESTED AND CONTINGENT FUTURE INTERESTS IN ILLINOIS. *Albert Martin Kales*. Analyzing the cases where the classes of interests are distinguished and showing the present confusion in Illinois. 2 Ill. L. Rev. 301.

¹¹ *Powell v. Pennsylvania*, *supra*, 685.

II. BOOK REVIEWS.

LEGAL ESSAYS. By James Bradley Thayer. Boston: The Boston Book Company. 1908. pp. xvi, 402. 8vo.

This is a valuable volume. It is composed of essays heretofore scattered in the HARVARD LAW REVIEW and elsewhere. A mere mention of the names of some of them will remind many persons of their unusually fine quality, for here one finds again The Origin and Scope of the American Doctrine of Constitutional Law; Advisory Opinions; Legal Tender; A People without Law (The Indians); *Gelpcke v. Dubuque* (Federal and State Decisions); and Our New Possessions. The other essays, though not so well known, are of similar quality: International Usages; Dicey's Law of the English Constitution; *Bedingfield's Case* (Declarations as Part of the *Res Gesta*); Law and Logic; A Chapter of Legal History in Massachusetts; Trial by Jury of Things Supernatural; Bracton's Note Book; and The Teaching of English Law at Universities.

In almost every line that Professor Thayer wrote there is a certain literary quality. However technical the subject may be, his mode of dealing with it gives side lights from other topics by way of illustration or analogy or distant allusion; and those other topics cover a wide range. Shakespeare and Wordsworth here touch elbows with the Anglo-Saxon Laws of King Aethelbirht, the Year Books, Coke, Hale, Holt, Blackstone, Bentham, Sir Henry Maine, Marshall, the Dawes Bill, and the latest treaty with Spain — and all to good purpose. Surely no one has written of the law more entertainingly or more soundly. Hence this volume, though composed of what its author would have deemed fragments, may be expected to take a permanent place in legal literature, and to be read over and over again by all lawyers who find a charm in excellence of form and of substance.

No one will read the volume without regretting that the author did not find time to cover the whole of the two subjects — Constitutional Law and Evidence — with which his writing was principally concerned. His Preliminary Treatise on the Law of Evidence is by the present volume supplemented to only a slight extent — chiefly as to *res gesta*. His short volume on John Marshall happily contained a discussion of the chief early cases on constitutional law and gave an indication of Professor Thayer's mode of approaching many parts of that subject. The present volume gives an enlarged treatment of several topics in constitutional law and shows how much the profession has lost by the author's inability to finish the treatise that he had planned. Here is preserved his valuable demonstration of the historical reasons for the existence of the judicial power to treat as nullities the unconstitutional acts of legislative bodies — the essential peculiarity of American institutions. Here, too, is the explanation of the limits usually observed by the courts in exercising this power. Here is the conclusive presentation, historical and analytical, of the non-judicial nature of advisory opinions. Here is the discussion of the power of Congress to issue legal tender money, leading up to the conclusion that this power is incident to the borrowing power of a nation. Here too is the demonstration that the acquiring and governing of remote possessions, however questionable from the point of view of statesmanship, cannot be deemed unconstitutional. Yet why specify further? On every page one sees the work of a master, whose originality was matched by his learning and whose gracefulness of expression was equalled by his good sense.

E. W.

A TRUSTEE'S HANDBOOK. By Augustus Peabody Loring. Third Edition. Boston: Little, Brown and Company. 1907. pp. xxxvi, 224. 12mo.

Although the two previous editions of this work were both of comparatively recent date, yet, as the preface to the third edition explains, "the numerous

decisions . . . since the last edition have made it necessary to rewrite and enlarge many parts of it, particularly those parts treating the trustee's liabilities to strangers, extra dividends, and interstate law."

This book, covering only a portion of the law of trusts, is not put forth as an exhaustive or erudite treatise, but is only "meant to state, simply and concisely, the rules which govern the management of trust estates, and the relationship existing between the trustee and beneficiary." In general the task of epitomizing has been admirably performed. Mention, however, has been omitted of one or two cases to which seems attached an importance demanding recognition; for example, *Hardoon v. Belilios* ([1901] A. C. 118), holding a trustee entitled to indemnity from the general property of the *cestui que trust*. The text devotes little attention to theory or general principles, but consists, rather, of a compendium of adjudicated applications of the general principles. This method has resulted in a few obscure or misleading passages. At certain points, too, issue may well be taken with the author's views, as, for instance, his apparent conception that the *cestui's* estate is not a property right in the trust *res*. (See pp. 158 and 161.) Yet the work is marked by discriminating care in the derivation of doctrines from the various cases, and by a plain, terse, non-technical diction that renders the book readable even for laymen. The discussion of a trustee's "Duties" and of his "Management of Fund" should prove of especial utility. All in all, this little volume furnishes a handy book of first help for both lawyer and business man throughout the United States; while the great number of Massachusetts decisions cited and digested lends additional value for use in that Commonwealth.

J. H. W., JR.

FREDERIC WILLIAM MAITLAND. *Two Lectures and a Bibliography*. By A. L. Smith. Oxford: At the Clarendon Press. pp. 71. 8vo.

These two lectures are an interesting and discriminating appreciation of the qualities that made Professor Maitland our greatest legal historian. The complete bibliography of his writings from 1880 to 1907 is exceedingly impressive, but fills the reader with regret as he thinks what the bibliography would have become if Professor Maitland could have continued his work for another twenty-five years.

J. B. A.

NEGLIGENCE IN LAW. By Thomas Beven. In two volumes. Third Edition. London: Stevens and Haynes. Philadelphia: Cromarty Law Book Company. 1908. pp. cciv, 1-726; xi, 727-1505. 8vo.

FREDERIC WILLIAM MAITLAND. *Two Lectures and a Bibliography*. By A. L. Smith. Oxford: At the Clarendon Press. 1908. pp. 71. 8vo.

ELEMENTS OF THE LAW OF BAILMENTS AND CARRIERS. By Philip T. Van Zile. Second Edition. Chicago: Callaghan & Company. 1908. pp. lxxiii, 856. 8vo.

MINING, MINERAL, AND GEOLOGICAL LAW. By Charles H. Shamel. London and New York: Hill Publishing Company. 1907. pp. xxx, 627. 8vo.

FEDERAL USURPATION. By Franklin Pierce. New York: D. Appleton and Company. 1908. pp. xx, 437. 8vo.

THE AMERICAN GOVERNMENT, Organization and Officials with the Duties and Powers of Federal Office Holders. By H. C. Gauss. New York: L. R. Hamersley and Company. 1908. pp. xxiii, 871. 8vo.

APPRENTICESHIP IN AMERICAN TRADE UNIONS. By James M. Motley. Baltimore: The Johns Hopkins Press. 1907. pp. vii, 122.

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NO. 7.

THE CLOG ON THE EQUITY OF REDEMPTION.

I.

THE problem of the clog on the equity of redemption is all but as old as the equity of redemption itself. Early in the seventeenth century it became clear at length beyond all doubt that the courts of equity were henceforth going to grant redemption of mortgaged property as a matter of course in all cases, even when there had been no deception or overreaching, — and this notwithstanding the absolute legal title which the mortgagee had now in the estate, according to the very terms of the conveyance, by the passing of the day on which the repayment was to be made. Nothing that the courts of equity have felt obliged to do since that time to protect their equity of redemption from inconsistent limitations upon it has been so violent an interference with the rights of parties to a mortgage to agree as they please, as the original interposition of the equity of redemption itself. In this light the rule against any clog on the equity is a necessary corollary of the principle of redemption.

II.

Yet ever since the establishment of the equity of redemption there have been lenders with an eye to the ultimate acquisition of the mortgaged estate casting about for some device to evade this bothersome intervention of equitable relief. The first attempts were, as always, crude enough. A covenant was inserted in the

mortgage deed by which the borrower agreed never to claim redemption after default on the day of payment. It is natural that the courts of equity should have taken great offense at this, although they dismissed such agreements easily enough. "If a man makes a mortgage and covenants not to bring a bill to redeem, nay, if he goes so far as in *Stisted's Case* to take an oath that he will not redeem, yet he shall redeem."¹ Nor is such naïveté confined to early days; such attempts appear at intermittent intervals in our reports down to present times. Of course they all come to the same end. When a bill for redemption is filed setting forth such a mortgage in its entirety, the court of equity takes hardly a moment in passing to repeat that such a stipulation is void as a clog upon the equity of redemption.²

In a somewhat modified form the attempt to restrict the equity is next made. Agreements are entered into permitting recourse to equity for redemption for some period, but working an extinguishment of the equity in due time. The earliest report we have of a case of this sort of thing is *Howard v. Harris*:³ "Howard mortgages land, and the proviso for redemption was thus: provided that I myself, or the heirs males of my body, may redeem. The question was, whether his assignee should redeem it? And it was decreed, he should; for, if once a mortgage always a mortgage." It is needless to add that almost invariably like schemes have met a similar fate at the hands of the courts of equity.⁴

III.

We do not reach difficult cases until we have to deal with some reasonable business bargain in behalf of which some sensible legal

¹ *East India Co. v. Atkyns*, Comyns 347, 349.

² It is unnecessary to cite many cases to the effect that an agreement never to apply for redemption after default is void. See the following cases in particular: *Toomes v. Conset*, 3 Atk. 261; *Vernon v. Bethel*, 2 Eden 110; *Pugh v. Davis*, 96 U. S. 332; *Parmer v. Parmer*, 74 Ala. 285; *Jackson v. Lynch*, 129 Ill. 72; *Hart v. Burton*, 7 J. J. Marsh. (Ky.) 322; *Bayley v. Bayley*, 5 Gray (Mass.) 505; *Cherry v. Bowen*, 4 Sneed (Tenn.) 415; *Rogan v. Walker*, 1 Wis. 527.

³ 1 Vern. 33.

⁴ The few cases following will be sufficient to illustrate the well-established rule that any arrangement contemporaneous with the mortgage for cutting short the equity of redemption is invalid. *Price v. Perrie*, 2 Freem. 258 (redemption to be during life of mortgagor); *Bowen v. Edwards*, 1 Rep. in Ch. *221 (no redemption after seven years); *Spurgeon v. Collier*, 1 Eden 55 (redemption to be during joint lives); *Salt v. Marquis Northampton*, [1892] A. C. 1 (redemption to be during life of mortgagor); *Bradbury v. Davenport*, 114 Cal. 593 (no redemption after four months after default); *Stover v. Bounds*, 1 Oh. St. 107 (no redemption after certain day fixed).

distinction may really be urged. We have, it seems, a case of a provision for cutting short an equity of redemption which really deserves serious consideration in *Batty v. Snook*.¹ It is difficult to abbreviate the facts in that case. There was a mortgage subsisting between the parties and other unsecured indebtedness. A partial settlement was made between the parties, leaving a balance of \$2000 still due. In pursuance of an understanding the mortgage was cancelled and an absolute conveyance was made by the debtor to the creditor. By a contract dated the next day the grantee agreed to resell the premises, and the grantor agreed to repurchase them at the price of \$2000 and interest to the day fixed for the completion of the purchase, with the provision that if the payment was not made on that day fixed then all rights should be lost. The court first satisfied itself that these arrangements were all part of one transaction; for if not, then, of course, by established law a provision in a contract of sale and purchase that time shall be of the essence would be respected more or less. So, convinced that what had really happened was an extension of the existing mortgage relation, Mr. Justice Manning concluded thus:

"Once a mortgage always a mortgage may be regarded as a maxim of the court. Equity is jealous of all contracts between mortgagor and mortgagee by which the equity of redemption is to be shortened or cut off. To allow the equity of redemption to be cut off by a forfeiture of it in a separate contract would be a revival of the common law doctrine, using for that purpose two instruments, instead of one, to effect the object."²

It may be shown in this connection better than at some later time under what circumstances these principles become really inapplicable. Take by way of contrast the somewhat similar case of *Davis v. Thomas*.³ In that case too there was an existing mortgage relation and the mortgagor made an absolute deed of release to the mortgagee. But in this case there was a subsequent conveyance for the proper consideration of £1800, which was made up of the mortgage debt thereby cancelled and the payment of an additional sum of money to the mortgagor. As part of the same

¹ 5 Mich. 286.

² The cases in accord with this in principle are very numerous and are all to the same effect. See, for additional illustrations, *Bradbury v. Davenport*, 114 Cal. 593; *Tennery v. Nicholson*, 87 Ill. 264; *Turpie v. Lowe*, 114 Ind. 37; *Linnell v. Lyford*, 72 Me. 280; *Mooney v. Byrne*, 163 N. Y. 86; *Wright v. Niles*, 13 Vt. 341.

³ 1 Russ. & M. 506.

transaction the mortgagee demised the estate to the mortgagor for a term of years with the proviso that in case the rent were regularly paid when due, the lessee should be at liberty to repurchase the estate from the mortgagor at the price of £1850 at any time within five years. The lessee defaulted in payment of his rental, but applied within five years to repurchase. But the Master of the Rolls said:

"In all cases of the payment of money, where penalty or forfeiture is introduced for the purpose of security, there a court of equity will relieve against the penalty or forfeiture, upon the ground of full compensation by giving interest. But where there is no stipulation for penalty or forfeiture, but a privilege is conferred, provided money be paid within a stated time, there the party claiming that privilege must show that the money was paid accordingly."

Or, to cast the reasoning in another form, since there was no indebtedness left outstanding by this transaction, there was a real sale and not a persisting mortgage. It is only in a true mortgage that there is an equity of redemption with the protection of which the court is concerned at all. Mere options, on the contrary, die when their time comes.¹

IV.

It is much the same problem in a more developed form when there is a stipulation in the mortgage that the mortgagee may purchase the interest of the mortgagor on such terms as are therein agreed. Such an option may be valuable; indeed it may be one of the considerations which induced the mortgagee to make the advance. Nevertheless such an arrangement has every presumption against it, as it is in effect a provision in the mortgage for the extinguishment of the equity of redemption. And as has been seen in various cases such schemes are altogether abhorrent to courts of equity upon general principle regardless of particular cases.

¹ The cases similar to this in principle, holding that when it is clear that there has been simply a conditional sale there is no basis for any equity of redemption, are again innumerable. It will be sufficient to refer to the following illustrations: *Conway v. Alexander*, 7 Cranch (U. S.) 218; *Flagg v. Mann*, 2 Sumn. (U. S.) 533; *Haynie v. Robertson*, 58 Ala. 37; *Spence v. Stedman*, 49 Ga. 133; *Hibernian Bank Ass'n v. Council Nat'l Bank*, 157 Ill. 54; *Robinson v. Cropsey*, 2 Edw. Ch. (N. Y.) 138.

The leading case of this sort is undoubtedly *Re Edward's estate*.¹ An estate was mortgaged for an advance of £2500, and the proviso in the mortgage was that in case interest for one full year should be defaulted, then the mortgagee might purchase the mortgaged premises for such sum as with the sum of £2500 and interest then due thereon would make £4000. The question being raised in the Estates Court, Mr. Justice Hargreave held that the mortgagee got no rights by such an invalid provision. He said:

"When the contract is part of the arrangement for the loan, and is actually inserted in the mortgage deed, it is presumed to be made under pressure, and is not capable of being enforced. If the land had fallen in value below £4000, Mr. Jackson would have insisted on being treated as a mortgagee; but, as it has risen, he says he is a purchaser; that is, he gets a collateral benefit over and above his principal and interest which a court of equity never permits. This contract is virtually a clause of foreclosure on a fixed day."

Although at times an undercurrent of opposition to this result may be detected, there has never been any decision squarely to the contrary, for even those who felt disinclined to agree with this result have appreciated that it could not be otherwise unless the general doctrine against cutting short the equity of redemption should be held for naught. However, this particular form of the general problem must be considered as finally settled by a recent decision of the House of Lords, *Samuel v. Jarrah Timber Corporation*.² In that case the mortgagee of debenture stock from a corporation was given the option to purchase the whole or any part of such stock at forty per cent at any time. In redemption proceedings brought by the corporation it was held that although Samuel had claimed his option before repayment was offered, it was all in vain, as the option was void, Lord Lindley saying:

"The doctrine 'once a mortgage always a mortgage' means that no contract between a mortgagor and a mortgagee made at the time of the mortgage and as part of the mortgage transaction, or, in other words, as one of the terms of the loan, can be valid if it prevents the mortgagor from getting back his property on paying off what is due on his security. Any bargain which has that effect is invalid, and is inconsistent with the transaction being a mortgage."³

¹ 11 Ir. Ch. 367.

² [1904] A. C. 323.

³ There are enough cases with these facts to show that such stipulations furnish the clearest sort of fetter upon the equity of redemption. The following cases are

V.

It has been assumed thus far that once the court is convinced that the mortgagor is left by the mortgage with no clog upon his equity of redemption, he is then free to enter into such bargains as he pleases for the disposal of his equity of redemption. But this is not altogether true; for the court still watches transactions between the mortgagor and mortgagee with a suspicious eye. The mere fact that there has been a formal arrangement subsequently made by which the mortgagor has purported to convey his interest to the mortgagee does not in itself satisfy the court, it will scrutinize the transaction to determine for itself whether or not it will permit the release of the equity of redemption, which the parties have given out as accomplished.

To take the simpler case first, if the court discovers that the conveyance from the mortgagor to the mortgagee was made without consideration, the original indebtedness still remaining, it will hold that the transaction can have no other meaning than that the mortgagee is given the absolute title as further security. Therefore the court will declare that the mortgage situation still persists; for the court has held in countless cases that where an absolute deed is found in association with continued indebtedness there is upon fundamental principles a mortgage in substance with the corresponding right of redemption, notwithstanding any bargain by which the parties may attempt to avoid the full effects of this consequence. In *Pugh v. Davis*,¹ the leading American case of this particular sort, the United States Supreme Court said by Mr. Justice Field:

"It is also an established doctrine that an equity of redemption is inseparably connected with a mortgage; that is to say, so long as the instrument is one of security, the borrower has in a court of equity a right to redeem the property upon payment of the loan. This right cannot be waived or

worth examination in addition to the two just quoted: *Price v. Perrie*, 2 Freem. 258 (option to purchase on default); *Willett v. Winnell*, 1 Vern. 488 (mortgage for £200, provision for purchase by the mortgagee after default on payment of £78); *Obry v. Trigg*, 9 Mod. 2 (query in case of sale of the equity at any time, mortgagee to have preemption); *Kanarau v. Kuttorly*, 1 R. 21 Mad. 110 (provision for sale of the property to the mortgagee in case of default at price to be then fixed by arbitrators); *Turpie v. Lowe*, 114 Ind. 37 (mortgagee given right to retain property in case of default by paying fair cash value).

¹ 96 U. S. 332.

abandoned by any stipulation of the parties made at the time, even if embodied in the mortgage."¹

When it appears that consideration has been paid by the mortgagee to the mortgagor for the release of the equity of redemption, then the principles of mortgage law that have just been exemplified do not apply to the situation. Indeed, the concern of equity is that, notwithstanding that he has made a mortgage, the borrower shall remain the owner of his estate, the title being in the mortgagee simply for security. Now, ownership in full includes the power of disposition; and so the general rule is that the mortgagor is free to sell the equity of redemption which the court creates for him to any one he pleases, including the mortgagee. However, there is enough of a fiduciary relation between mortgagor and mortgagee to lead equity to scrutinize the transaction to determine whether the consideration is adequate. The leading American case for this, *Villa v. Rodriguez*, is again in the United States Supreme Court.² The actual facts in that case, to be sure, were peculiarly strong, for the mortgagee was a scoundrelly brother and the mortgagor was a widow in financial straits. But this language of Mr. Justice Swayne was of general application:

"The law upon the subject of the right to redeem where the mortgagor has conveyed to the mortgagee the equity of redemption is well settled. It is characterized by a jealous and salutary policy. Principles almost as stern are applied as those which govern where a sale by a *cestui que trust* to his trustee is drawn in question. To give validity to such a sale by a mortgagor it must be shown that the conduct of the mortgagee was, in all things, fair and frank, and that he paid for the property what it was worth."³

¹ The decision of this case depends upon the doctrine, now established by countless cases, that even an absolute transfer for security of a debt may be shown to be a mortgage with a consequent equity of redemption. Good illustrations of this rule selected at random are: *Lincoln v. Wright*, 4 De G. & J. 16; *Re Duke of Marlborough*, [1894] 2 Ch. 133; *Miller v. Thomas*, 14 Ill. 428; *Linnell v. Lyford*, 72 Me. 280; *Cullen v. Cary*, 146 Mass. 50; *Strong v. Stewart*, 4 Johns. Ch. (N. Y.) 167.

² 12 Wall. 323.

³ There is some dissent from this view that there is such a relation between mortgagor and mortgagee that equity may set aside an unfair bargain for the extinguishment of the redemption. See *McMillan & Son v. Jewett*, 85 Ala. 476; *Brown v. Gaffney*, 28 Ill. 149; *Trull v. Skinner*, 17 Pick. (Mass.) 213; *Shouler v. Bonander*, 80 Mich. 531; to the effect that there may be such interference. But see *De Martin v. Phelan*, 115 Cal. 538; *Pritchard v. Elton*, 38 Conn. 434, which are rather opposed.

VI.

This general distinction accepted in all the cases discussed in this article — that an agreement which is part of the mortgage transaction may be void, while if in an entirely separate dealing it will be valid — has seemed so strange to some observers that it is at times made the basis of an attack upon the doctrine itself. But the writer trusts that in the course of this discussion it will appear that this is a proper distinction in all situations. The concern of a court of equity is chiefly that an equity of redemption shall be created in the property mortgaged, free from all limitations. Once it is satisfied as to that, as has been seen, the court usually leaves mortgagor and mortgagee to deal with each other as they see fit, if in good faith.

Thus even an executory agreement looking to the extinguishment of the equity of redemption on condition will be held valid if entered into by mortgagor and mortgagee at a time subsequent to the mortgage transaction. In *Wynkoop v. Cowing*,¹ a case of this sort, Mr. Justice Breese said :

"Although parties may not at the same time, and by the same instrument, stipulate for converting a loan and mortgage into an absolute purchase upon the happening of a subsequent event, yet it is also true that a subsequent *bona fide* and fair agreement for the purchase and extinguishment of the equity of redemption for a valuable consideration, will be sustained, and such this appears to have been."²

A far more difficult case, but still not altogether impossible, is one like *Gleason's Administratrix v. Burke*.³ In that case the contention was that an agreement made contemporaneously with the mortgage was a distinct bargain. The facts really bore out that contention, for although the whole lot was assigned to the lender on the occasion of the loan of the \$1500 and there was a provision that upon the repayment of the sum a twenty-five foot strip in the rear of the lot should be retained by the mortgagee, — still the evidence sufficiently showed that there was independent bargaining as to the rear strip, on which the mortgagee was to erect

¹ 21 Ill. 570.

² Upon similar principles it was held in *Reeve v. Lisle*, [1902] A. C. 461, that a mortgagor and mortgagee may by an independent transaction subsequent to the mortgage make a valid agreement which gives the mortgagee the option of purchasing the mortgaged property.

³ 20 N. J. Eq. 300.

a building, as the mortgagor regarded it as adding to the value of the retained premises. And the Chancellor, although properly suspicious, finally conceded :

“ But a borrower and lender may lawfully make other bargains even relating to the mortgaged property, and if they are not in consideration of the loan, or the condition of its being made, and are otherwise lawful, they may be enforced.”¹

VII.

Thus far the cases have been all of the type where the extinguishment of the equity of redemption is threatened, and for these it is comparatively easy to state a principle. It is because a clog upon the redemption may still leave the equity in existence that it is really difficult to state the limits of the doctrine. As the leading case upon the whole subject has not yet been stated, it may not have been appreciated how wide the problem is. That is the early case of *Jennings v. Ward*,² the pregnant report of which follows :

“ The defendant Ward lends money to Neale, the Groom Porter, to carry on his buildings in Cock and Pye fields, and took a mortgage from him to secure £16,000, with interest at 6 per cent, and in another deed, executed at the same time, took a covenant from Neale, that he should convey to the defendant, if he thought fit, ground rents to the value of £16,000, at the rate of twenty years' purchase. The bill being to redeem, the defendant insisted on that agreement ; but the Master of the Rolls decreed a redemption, on payment of principal, interest, and costs, without regard to that agreement ; but set aside the same as unconscionable. A man shall not have interest for his money, and a collateral advantage besides for the loan of it, or clog the redemption with any by-agreement.”

Ever since this case our law has had to deal with the recognized rule that a mortgagee may not stipulate at the time of the mortgage for such advantage as will constitute a clog on the equity of redemption. And this rule prevails to some extent wherever the English notion of the mortgage transaction is found. Even in British India the money lenders have been compelled at length

¹ In *Earpe v. Boothe*, 24 Grat. (Va.) 368, it was held that where, in completing a purchase in which the borrower had an interest, the lender advanced the necessary funds, it could be agreed that forty acres of the tract the lender should have at an agreed price, the remainder of the land to be held in mortgage for the payment of the balance of the money.

² 2 Vern. 520.

to submit to it. One of the many recent cases from those parts is *Sheo Shanker v. Parma Mahton*.¹ In that case there was an agreement between mortgagor and mortgagee that until another sum not secured was paid the property should not be redeemed. The English decisions were considered by the court as binding upon them, and they gave redemption in spite of the agreement made. "As we understand it," they said, "the rule forbids the enforcement of any stipulation which puts a hindrance or stay in the way of the mortgagor in the exercise of his right to redeem."²

VIII.

It must be admitted that a certain prejudice against all collateral advantages giving profit to the mortgagee by virtue of his position is present in the earlier cases in addition to the more fundamental objection to all arrangements clogging the equity of redemption. This has led to many decisions in which the principle against restraint of the equity of redemption was pressed further than this rule in itself should go. Doubtless it is true that if there is such real overreaching in the negotiation of the mortgage as to make it an unconscionable bargain, courts of equity may give relief. Moreover, courts of equity may treat a mortgagee, especially a mortgagee in possession, to some extent as a trustee and as such disabled from taking collateral profits. But it has tended to confuse the issue to speak of arrangements really set aside as in violation of these principles of equity as void as clogs upon the equity of redemption by reason of collateral advantage.

Thus cases like *Godfrey v. Watson*³ are cited as opposed to restriction upon the equity of redemption, yet all the Lord Chancellor said in that case was that —

¹ I. R. 26 Allahabad Series 559.

² Other cases of collateral advantage are worth noting: *Broad v. Selfe*, 11 Wkly. Rep. 1036 (mortgagee to have 5% additional on the value of the property, whether or not the mortgagor sold it during the pendency of the mortgage); *Chapple v. Mahon*, Ir. R. 5 Eq. 225 (provision for a bonus to the mortgagee beyond interest in case the mortgagor paid off the loan within a certain time); *Browne v. Ryan*, [1901] 2 Ir. 653 (mortgagor agreed to give the sale of the land to the mortgagee at 5% commission; if the estate was sold through another auctioneer the mortgagee was to have 5% just the same); *Hyndeman v. Hyndeman*, 19 Vt. 9 (a mortgage of land to secure a loan of \$600; provision that the land should be sold if possible, the mortgagee to have \$800 of the proceeds in satisfaction). In all of these cases the provisions abstracted were held void.

³ 3 Atk. 517.

"a mortgagee shall not be allowed for his trouble in receiving the rents of the estate himself, but if an estate lies at such a distance from the place of his residence, as he must have employed a bailiff, if it had been his own, he shall then be allowed such sums as he has paid to a bailiff, to receive the rents of this estate."¹

Again, if a court of equity sees promises extorted from a mortgagor by the occasion of the borrowing when he is in the power of the mortgagee, they will relieve against them as unconscionable. This feeling has been so fostered by usury statutes that it long persists their repeal, as indeed it is proper in extreme cases that it should. Most of the American cases, strangely enough, really approximate no nearer to this phase of the problem of the clog on the equity of redemption than this. *Uhlfelder v. Carter's Administrator*,² sometimes cited in this connection, was a case where the mortgage provided that the mortgagor, a small farmer, should deliver to the mortgagees for sale and storage some fifty bales of cotton, or, in the event of a failure to so deliver, to pay as liquidated damages one month's storage and an estimated commission of two and one-half per cent. In condemning this scheme Chief Justice Bicknell said:

"The mortgagees, in the light of the facts, were, under the guise of a stipulation for the future delivery of cotton for storage and sale, but stipulating for the payment, in addition to lawful interest on the debt due them, of the additional profit of the usual charges for storage, and the commission on the sales."³

¹ Other cases where the principle against clog on the equity of redemption has been forced unduly may be noted here: *In re Roberts*, 43 Ch. D. 52 (a mortgagee who was a solicitor denied usual compensation for preparing the mortgage); *Field v. Hopkins*, 44 Ch. D. 524 (a mortgagee who was an appraiser was denied usual compensation for valuation of the premises). But if a mortgagee receives a collateral advantage in some other character than as mortgagee, he is not now compelled to account therefor. *White v. London Brewery Co.*, 42 Ch. D. 237 (mortgagee, a brewer, profiting by selling beer to mortgagor, a publican); *Rogers v. Herron*, 92 Ill. 593 (mortgagee receiving rents and profits as vendee).

² 64 Ala. 527.

³ It may be as well to cite some other American cases of this sort. In the cases first cited the stipulations noted were held invalid. *Kiddermaster v. Brossard*, 105 Mich. 219 (stipulation for \$40 as attorney's fee); *Northwestern M. L. Ins. Co. v. Butler*, 57 Neb. 198 (provision for expenses incurred in preparing for foreclosure); *Vilas v. McBride*, 62 Hun (N. Y.) 324 (agreement that mortgagee of hotel property should have free the manure from the stables); *Dailey v. Maitland*, 88 Pa. St. 384 (5% additional as attorney's fee). The cases next cited, however, hold such provisions valid: *Clauson v. Munson*, 55 Ill. 394 (attorney's fee); *Tholen v. Duffy*, 7 Kan. 405 (attorney's fee).

IX.

To a very considerable extent, however, this former vague principle against mere additional advantage to the mortgagee in consideration for the loan of his money must be regarded as obsolescent if not obsolete. Wherever usury laws are repealed surely this opposition to merely unusual return for the use of money must gradually die out. Indeed, it is many years since the English court in *Potter v. Edwards*¹ compelled a mortgagor who had promised to pay £1000 in return for a present advance of £700 to pay the £1000 in order to redeem his premises. This does not mean that if £1000 were promised in a year for a present advance of £100 that the bargain would stand in a court of equity, which of course has general principles against all unconscionability, whether in mortgage transactions or elsewhere.²

That this is quite in accordance with modern business ideas is shown in the very recent case of *Buchanan v. Harvie*,³ where for an advance of £3500, made on security of problematical value, £6000 in cash and £5000 in shares were promised; and it was held that redemption would only be granted upon the terms of the full performance of the whole promise. To quote the language of Justice Barker:

"The difference between the sum loaned and the sum secured may, and, in fact, does seem large even where the security is as speculative as the evidence shews this was. And, if the validity of the transaction were being impeached on the ground of oppression or surprise or any similar ground, this difference would be an important factor in the determination of that question. But no such defense is set up here, and if it were, there is no sufficient evidence to support it."⁴

¹ 26 L. J. Ch. 468.

² Two of the many cases where mortgage transactions have been set aside as plainly unconscionable are: *Chambers v. Baldwin*, 9 Ves. 254 (provision that defaulted interest should be added to principal); *Fulthorpe v. Foster*, 1 Vern. 477 (the Bristol bargain — the principal to be repaid in instalments, the interest payments to continue at the original figure).

³ 3 N. Bruns. Eq. 61.

⁴ It will be sufficient to cite two recent cases by way of further illustration: *Maitland v. Upjohn*, 41 Ch. D. 126 (bonuses deducted from advances made on speculative security, held that the principal must be repaid without deducting such discounts); *Maxwell v. Tepping*, [1903] 1 Ir. 498 (a new deal by which further sums were advanced by a mortgagee to a mortgagor upon the terms that the rate of interest should be increased by 1%, held not to constitute a clog on the equity of redemption).

X.

It must be realized, therefore, that according to the more modern notions the mere fact of some collateral advantage is not fatal in itself unless it can be shown to be a fetter upon the equity of redemption as well. The ruling case to this effect is *Biggs v. Hoddinott*.¹ This was the case of a mortgage of his hotel by the defendant Hoddinott to the plaintiff Biggs, a brewer, to run five years, with a covenant by the mortgagor that during the continuance of the security he would deal exclusively with the mortgagee for all malt liquors sold on the mortgaged premises. The mortgagor having ceased to purchase beer of the mortgagee, he moved for an injunction, which was granted. In the Court of Appeal Lord Lindley, then Master of the Rolls, stated the modern law thus:

"The proposition stated in *Jennings v. Ward* is too wide. If properly guarded, it is good law and good sense. A mortgage is regarded as a security for money, and the mortgagor can always redeem on payment of principal, interest and costs; and no bargain preventing such redemption is valid, nor will unconscionable bargains be enforced. There is no case where collateral advantages have been disallowed which does not come under one of these two heads. To say that to require such a covenant as that now in question is unconscionable is asking us to lay down a proposition which would shock any business man, and we are not driven to it by authority."²

¹ [1898] 2 Ch. 307.

² 2 Vern. 520.

³ Another point was urged unsuccessfully in *Biggs v. Hoddinott*, *supra*, which seems a curious contention in modern times. In the first enthusiasm for redemption it seems to have been thought that an agreement between mortgagor and mortgagee that the loan was to run for some extended period, no reconveyance to be made until a repayment on that day, might be a clog upon the equity of redemption. *Talbot v. Braddel*, 1 Vern. 393 (thirty years); *Cowdry v. Day*, 1 Giff. 316 (twenty years). The only truth there can be in this notion is that the circumstances including such postponement may be so extraordinary as to cause the whole arrangement to be considered unconscionable. Otherwise, until the passing of the legal right to redeem created by the parties, there is no reason for the interposition of the equity of redemption. And it should be said that the doctrine finds little favor in the modern English cases. See *Brown v. Cole*, 14 Sim. 427; *Guardians of the Poor v. Metropolitan Life Assurance Soc.*, [1897] A. C. 647. No American case, so far as the writer knows, has ever considered mere length of time as inconsistent with a mortgage transaction; indeed we have countless corporate mortgages to secure bonds ranging in duration from twenty to one thousand years. See *Philadelphia & R. Ry. Co's App.*, 4 Am. & Eng. Ry. Cas. 118. Moreover it seems plain that mere stipulation for a long investment is not

Emboldened by this success, counsel brought to court another case much more complicated; and in *Santley v. Wilde*¹ a clever scheme was presented for approval. The sum of £2000 was loaned to the lessee of a theatre, and the borrower agreed not only to repay that sum with interest in five years, but also to give the lender one-third of the net profits during the term of the lease. And the mortgage executed upon the lease secured by its terms not only the repayment of the debt and interest in the five years, but the payment of one-third of the net profits for the whole ten years. It would seem that this device was too plain an evasion of the rule to pass examination, but so ably was the case argued to the Court of Appeal that they held the whole transaction valid, Lord Lindley making this dubious distinction:

"Any provision inserted to prevent redemption on payment or performance of the debt or obligation for which the security was given is what is meant by a clog or fetter on the equity of redemption and is therefore void. It follows from this, that once a mortgage always a mortgage; but I do not understand that this principle involves the further proposition that the amount or nature of the further debt or obligation the payment or performance of which is to be secured is a clog or fetter within the rule."

If *Biggs v. Hoddinott* and *Santley v. Wilde* had both persisted as accepted law for any time, there would have been an end of the greater part of the accepted doctrine against the clog on the equity of redemption; and indeed many acclaimed its downfall as wholly in accordance with modern enfranchisement. But the doctrine against fettering the equity of redemption has such firm foundations in mortgage law that it was not shaken by these decisions; and as will be seen presently, while it is generally supposed that *Biggs v. Hoddinott* is good law, *Santley v. Wilde* is distinctly overruled. And the writer believes that this differentiation probably is good law for modern conditions. The real test in the matter is not whether the mortgagor is subjected to various burdens during the currency of the mortgage, unless indeed the price extorted from him for the hire of the money is really unconscionable; but the true inquiry, it is submitted, is whether after repayment

an improper advantage for the mortgagee to take. The only possible legal objection that can arise to long-time mortgages would seem to come from the rule against remoteness, to which, probably, they form a necessary exception. See Gray, *Rule Perp.*, 2 ed., §§ 562-570.

¹ [1899] 2 Ch. 474.

of his loan the mortgagor is free from interference with his enjoyment again of full ownership.

XI.

We come at length to the two recent cases in the House of Lords in which this whole matter was threshed out to a conclusion which should be accepted as final wherever our law prevails. In *Noakes & Co., Ltd. v. Rice*¹ the facts were that a mortgage upon a lease of a public house made by the publican to his brewers provided in usual form that when the borrower should repay all sums due to the lender the mortgaged premises should be reconveyed, with the further stipulation so framed as to run with the land that, whether any money should or should not be owing on the security, all malt liquors sold upon the premises should be bought of the brewers. When the publican came with his bill to redeem, all the English courts in succession held this stipulation void. And indeed this would seem to be the typical case of a clog on the equity, wherever this rule is developed in full, a fetter which is designed to outlast redemption. To quote the pithy statement of Lord Davey:

“Once a mortgage always a mortgage, and nothing but a mortgage. The meaning of that is that the mortgagee shall not make any stipulation which will prevent a mortgagor who has paid principal, interest, and costs, from getting back his mortgaged property in the condition in which he parted with it.”

Yet doubts were left unsettled by *Noakes v. Rice* because its facts made out so strong a case of clog on the equity of redemption, by reason of the fact that it was assumed by most of the judges, though not all, that the covenant if valid would create a hold upon the property itself even in the hands of a vendee. But in *Bradley v. Carrett*,² in the next year, the House of Lords had to deal with a case of a covenant in regard to the property designed to outlast redemption, which could not be said to be specifically enforceable. A holder of shares in a tea company mortgaged the shares to secure a loan and agreed to use his best endeavors to secure that “always thereafter” the mortgagee should have the sale of all the company’s teas as broker, and, in the event of any of the company’s teas being sold otherwise than through the mortgagee, to pay him the amount of the commission he would

¹ [1902] A. C. 24.

² [1903] A. C. 253.

have earned if the teas had been sold through him. After the mortgage was paid off the company employed other brokers, and this was a suit for breach of covenant. The lower courts held the agreement valid, but the House of Lords reversed them upon grounds thus stated by Lord Macnaghten:

"My Lords, I do not think it is necessary that there should be any hold upon the property, direct or indirect. I think, as I ventured to say in *Noakes v. Rice*, that equity will not permit any device or contrivance designed or calculated to prevent or impede redemption. And I think your Lordships gave sanction to that proposition when you approved the decision in the Irish case of *Browne v. Ryan*.¹ Can you impose on the equity of redemption a fetter operating indirectly, when you cannot, as it is admitted, impose a fetter which operates directly? My Lords, I should have thought that that question answered itself — you cannot do indirectly that which you must not do directly."

The meaning of these decisions should be obvious, whether or not one agrees with the policy that dictates them. In order to have that which is forbidden as a clog on the equity of redemption we must have this situation created, that the debtor who has mortgaged his property will not upon repayment to his creditor emerge from the transaction as free in his ownership as he was before. That he has to pay high for his money is not enough, so long as by the repayment of everything due, every incumbrance that there is upon his property will be wiped off. And there is in the eye of equity a fetter upon his property if the covenant he has been induced to make will, after redemption, hamper him in the full enjoyment of his property or hinder him in the disposition of it. It is enough, that is, to constitute a clog upon the equity of redemption if the covenant will affect the mortgagor after redemption as an owner of the *res*.²

¹ [1901] 2 Ir. 653.

² The law as thus settled in the beginning of the twentieth century seems to be nearly the same as the law at the beginning of the nineteenth century. There was a correspondingly large number of decisions within a few years about that time, most of them concerning the validity of the terms of the mortgages of West Indian estates to London factors. In *Bunbury v. Walker*, 1 Jac. & W. 225, it was properly held that an agreement that the lender should be the consignee of the borrower during the currency of the mortgage was valid, and the warning was properly given that a covenant of this sort was unenforceable in so far as it attempted to secure to the lender the position of consignee after repayment of the debt. *Cox v. Champney*, Jac. 576, has a dictum to the same effect, making the same distinction. To be sure, *Chambers v. Goodwin*, 9 Ves. 254, suggested that such collateral profits could not be taken, but that was a case of

XII.

Considered in a broad way, this rule against clogging the equity of redemption is one of the many instances of the setting aside of the deliberate bargains of the parties upon the ground that they are contrary to the policy of the courts. The right of men to hold such contracts as they can get is subject to many limitations imposed for the common good. But especially when it is a case, as this one is, where the contract of the parties comes into real opposition with a fundamental doctrine, its fate is certain at the hands of a court vigilant to protect its own. Since it is all a matter of policy, it cannot be expected that all men will agree as to the propriety of such interference. But to the writer the doctrine against the clog on the equity of redemption seems one of the striking examples of the great truth that the ethical standard of our law is often higher than the average morality of the commercial community.

Bruce Wyman.

mortgagee in possession, as was *Leith v. Irvine*, 1 Myl. & K. 277, and the court treated a mortgagee in possession to that extent as a trustee in both cases.

NON-CONTENTIOUS JURISDICTION IN GERMANY.

I. DISTINCTION BETWEEN CONTENTIOUS AND NON-CONTENTIOUS JURISDICTION.

THE function of the judiciary is to determine the rights of contesting parties. The action of the courts depends, therefore, upon two conditions: there must be a contest between at least two parties; and this contest must concern rights, that is, questions of law. When there is only one party, the court does not act. It may sometimes be of great value in the management of affairs to know what the opinion of the court is, but when there is no controversy with another party the court's opinion cannot be had. Not every contest, however, entitles the contestant to the action of the court; it must be a contest about rights. For instance, A differs with B about the value of a piece of land or a painting, but if there is no question of rights between them they cannot bring the matter before the court. The province of the judiciary is therefore to decide contests about rights, and in deciding these contests to state the law. Apparently there must be a pre-existing right and a pre-existing law before the courts begin to act, and the creation of rights as well as of law is not within the task of the judiciary. Now the question arises, how are rights created and how is the law created?

The law has two sources, customary or common law and statute law. The original source is the customary law formed from the opinion of the people. The statute law given by the legislative power extends today more and more widely in all states, but apparently no statute can be thoroughly complete, there must always be some deficiencies. The courts supply these by way of interpretation and analogy, and might therefore in a given case be regarded as legislators. But in fact they are not legislators, for two reasons: first, the opinion of the court is only given for the special case and has not the character of general law; secondly, the judge in giving his opinion is bound by his conscience and states the law more than he creates it; the legislator, on the other hand, when creating the law is free to follow any course which he may think expedient. Therefore, at least theoretically, the courts cannot be regarded as creating the law.

Nor does the function of the courts consist in the creation of private or individual rights when they decide contests. As private rights exist for the mere benefit of the individual, so their creation seems to be the mere privilege of the individual, and there seems to be no reason for the organs of the state to assist the individual in the creation of these rights.

In fact it is the rule that private persons create their rights; *e.g.*, in making sales, mortgages, and the like. But no state exists where the public authority does not give its assistance in this matter. For instance, a child owning property may become an orphan; the law of the state may say that the next of kin or some other fitting person is entitled to act in the child's behalf. All business done by such person for the child with other persons is of a merely private character, and when contests arise the matter may be brought before the court. But, in fact, in all states the law prescribes that this person cannot act without public authorization, as by an appointment by the orphans' court, or by grant of letters of guardianship. The acts done by him without this authorization are void. And so the state, by granting letters of guardianship and by giving its sanction to certain transactions of the guardian, assists the individuals in creating their rights. Another illustration: somebody dies leaving a will. The carrying out of the provisions of this will is a merely private matter between the heirs and the grantees in the will; when they come in conflict, they of course go before the court. But the law often prescribes that no private rights can be created by this will unless the will has been proved, unless letters of administration have been granted, or other formalities taken. Or somebody wants to sell his property. This matter, although a private affair between the seller and the buyer, needs for its validity in most jurisdictions, at least in regard to third persons, the recording of the act in some register kept by public authority.

The assistance of the public authorities in cases of the character described is necessary to create individual rights. This kind of public action is generally called non-contentious jurisdiction (*freiwillige Gerichtsbarkeit*). Therefore the expression non-contentious jurisdiction means the assistance of the state or public authorities in the creation of private rights.¹

¹ Cf. Gaupp-Stein, *Kommentar zur Civilprozessordnung*, 8 ed., 11; Schultze-Görlitz, *Kommentar zum Reichsgesetz über die freiwillige Gerichtsbarkeit*, 4 *et seq.* The German term *freiwillige Gerichtsbarkeit* has been chosen for the purpose of conven-

The word jurisdiction might perhaps suggest the view that these kinds of public acts are closely connected with the acts of the courts in litigious matters, civil or criminal. In fact, it is not so. The states in assisting the individuals to create their rights exercise merely *administrative functions*, and these functions can be performed as well by administrative officials as by judges. The registration of deeds, for instance, in this country, is mostly done by administrative authorities. And the German law provides that, although the functions of probate or orphans' courts or land registration are performed by judges, the legislatures of the different states are entitled to give these functions to administrative authorities.¹ As a rule, however, the states have charged their judges or some persons endowed with judicial authority, like notaries, to perform the affairs of non-contentious jurisdiction.

There are two reasons accounting for the development of these kinds of legal affairs in the history of the states. First, matters of this character were originally given merely to private individuals. So the family had the responsibility when a child needed a guardian, or an insane person a curator, or where the property of a deceased person had to be administered. Later the state regarded it as its duty to take care of minors, absentees, or to protect the *bona fide* purchaser of real property. For this purpose the state needed fitting officials, and of course it found the judges to have the most ability for the performance of this work on account of their knowledge of the law and their independence of the parties. The second reason why matters of non-contentious jurisdiction are principally performed by judicial officers is owing to the fact that many of these matters have grown out of contentious proceedings; like conveyances of property in the old Roman law,² and in the old English common law.³ When later the procedure before the courts began to be mere formality, and no real contest existed between the interested parties, it was quite natural that the performance of this function should remain in the courts where it had been before.

It may in a given case be difficult to decide whether a question belongs to the contentious or to the non-contentious jurisdiction.

ience. More correct would be the expression "Nicht streitige Rechtspflege." Cf. Nussbaum, — die freiwillige Gerichtsbarkeit, 1 *et seq.*

¹ Statute introducing the Civil Code, art. 147; Land Registration Act, art. 83.

² Sohm, Inst., § 12.

³ Brunner, Zur Rechtsgeschichte der römischen und germanischen Urkunde, 286.

The appointment of a trustee in bankruptcy proceedings or of a sequestrator in compulsory matters is, of course, always of contentious character, even if there may be only one applicant. On the other hand the appointment of a guardian or an administrator always remains of a non-contentious character, even though there may be disputant parties. But in many cases it is in fact doubtful whether the matter belongs to one or the other jurisdiction, and this question greatly depends upon statutory provisions. Thus Section 1635 of the German Civil Code says: "Where divorce has been granted and both parents have been declared guilty, the mother has the care of the sons under six years of age, and of the daughters; while the father has the care of sons over six years of age. The guardianship court may make a different provision if such provision is required, for special reasons, in the interest of the child." So when the father keeps the son under six years of age, the mother can sue him if he does not deliver over the son; and this suit has to be brought in the superior court (*Landgericht*) which granted the divorce. When, now, the father thinks that the best interests of the child will be promoted by his remaining with him, the law does not entitle him to raise objections in his defense, but he has to make application to the guardianship court (*Amtsgericht*) for a decree (matter of non-contentious jurisdiction) that the child may remain with him. Suppose this permission is given and meanwhile the mother has taken possession of the child; the father then has to sue her in the superior court on the basis of the decree given by the guardianship court.

It is apparent from this statement that whether the given matter belongs to the contentious or to the non-contentious jurisdiction greatly depends upon statutory provisions. If there are no statutory provisions in a given case, then the question has to be decided upon principle. The way of non-contentious jurisdiction has to be chosen if rights have to be created with the assistance of the public (judicial) authorities. A contentious jurisdiction is necessary if the pre-existence of the right is already supposed and the right is only to be declared by the court.¹

II. HISTORICAL REMARKS.

Non-contentious jurisdiction, regarded as a system different from contentious jurisdiction, is of comparatively recent origin.

¹ Cf. Gaupp-Stein, Schultze-Görlitz, Nussbaum, *supra*.

As the modern states regard their social duties to the individual more highly than formerly, so they find more occasion to interfere in private affairs than before. The old Roman law shows very few illustrations of non-contentious jurisdiction. One of them is the so-called *in jure cessio* used for different purposes;¹ for instance, as a way of conferring a legal title by means of a fictitious lawsuit before the magistrate. If A wished to transfer his ownership to B, A and B went before the magistrate, B claimed ownership as fictitious plaintiff, A admitted his title as fictitious defendant, and the magistrate gave his award in favor of the transferee. This was originally, of course, a contentious procedure, but later the contest was such a mere formality that the magistrate was in fact acting as an official by whom the conveyance was authenticated. A similar procedure was prescribed for adoption. These illustrations show how matters of contentious character became later non-contentious.

Matters of guardianship have been developed in the Roman law in a different way. The old Roman law did not know any interference of the state in this domain of rights; the next of kin exercised a kind of property right over the orphan. But in 443, by the Lex Atilia, the *praetor urbanus* became entitled to appoint a guardian if there was no natural or testamentary guardian, and by the law of the Roman Empire the appointment of guardians was more and more taken by the state.²

The old German law gave the care of minors and orphans to the whole family, called *Sippe*, and the *Sippe* appointed a suitable member of the family as guardian.³ The power of the state to interfere in matters of guardianship became more general in Germany after the Roman law had been received (sixteenth century). The modern German law has adopted the Roman system of the appointment and control of a guardian by the court. The French law, giving these functions to a family council which is composed of four relations of the minor and the justice of the peace as president, preserves the old functions of the *Sippe*. The German Civil Code provides that in certain exceptional cases a family council may be appointed.

Another matter of non-contentious jurisdiction growing out of the old German law is the registration of real property by the

¹ Sohm, Inst., § 12.

² Nussbaum, 85.

³ Brunner, Grundzüge der deutschen Rechtsgeschichte, § 4.

courts. The Roman law regarded real property as a mere *res*, but in the old German law the opinion prevailed that the community, as such, was entitled to control transactions in real property.¹ So under the oldest form of this transaction the interested parties with their witnesses went to the piece of land in question and made the transfer by solemn act. Later it was not necessary to go to the land, but the transfer had to be made in some public place,—in church or before the court. Finally all transfers had to be made in court, and the judge by his public authority granted the real rights. This is the system prevailing today in Germany.

The first statutory provisions concerning matters of non-contentious jurisdiction were made by the Notaries Act of 1512, and Police Acts of 1548, 1577, concerning matters of guardianship. The single states in Germany thereafter left the development of these matters to the customary law.²

Prussia enacted provisions concerning non-contentious jurisdiction in its *corpus iuris Fridericianum*. When the new German Civil Code was prepared, its authors prepared a bill regulating the matters of non-contentious jurisdiction. The statute which has been in force since January 1, 1900 (*Reichsgesetz betreffend die Angelegenheiten der freiwilligen Gerichtsbarkeit*) has been published, together with the Civil Code and various other statutes. Many matters of more local character have been reserved to the different states, which have enacted statutes; for instance, the Prussian Statute of September 21, 1899 regarding the non-contentious jurisdiction. Another main source of such jurisdiction is the Land Registration Act (*Grundbuchordnung*) in force since 1900. The German Civil Code contains matters of non-contentious jurisdiction; for instance, concerning the making of wills, certificates of inheritance, and others. Provisions belonging to the non-contentious jurisdiction may also be found in the Commercial Code, in the Trade Mark Statute, and in similar statutes.

III. JURISDICTION AND PROCEDURE.

The ordinary jurisdiction in Germany is exercised by four kinds of courts; namely, the district or lower courts (*Amtsgerichte*), the superior courts (*Landgerichte*), the courts of appeal (*Oberlandesgerichte*), and the supreme court (*Reichsgericht*) in Leipzig.

¹ I Gierke, *deutsches Privatrecht*, 266 *et seq.*

² Nussbaum, 7.

When these courts are acting in matters of non-contentious jurisdiction, the same number of judges sit as in civil matters. The district courts give their decisions by single judges; the superior courts by so-called chambers (Kammern) composed of three judges; the courts of appeal by so-called senates (Senate) of five judges; and the supreme court by senates of seven judges. The decrees are given by the chambers or senates as such, and not by the individual judges acting with the agreement of their colleagues. The name of the judge who gives the opinion of the court does not become known. The court acts impersonally as a court. Consequently, a dissenting judge has no opportunity to publish his opinion. When the chamber decides by a majority of its members to take a certain opinion, the dissenting judge has to accept this opinion and sign the decree even when he regards it as erroneous.

The capacity for the office of judge is acquired by a study of a course of law in the university of at least three years, after which an examination must be passed and the degree of *referendar* has to be acquired. The *referendar* is submitted to the discipline of governmental officials and is occupied during at least three years in the different courts, — the district court, superior court, and court of appeals; in the state attorney's office; in a lawyer's office; and, in many states, in the department of the executive. Thereafter a second examination has to be passed, by which the degree of assistant judge (Gerichtsassessor) may be acquired. The assistant judge is occupied in judicial positions during generally four to five years, receiving compensation for his services; and after that time he gets his appointment as judge. Every ordinary professor of law in a German university may be appointed judge. Other persons, however, cannot be appointed to the judicial office.¹

The judges keep their appointments for life, and can be changed or removed only for certain reasons and under certain proceedings prescribed by law. All courts except the supreme court are state courts; all judges, state judges. But the law used by them and the procedure in which they use it are with few exceptions uniform for the whole empire.

The non-contentious jurisdiction, so far as it is acted on by the courts, is almost exclusively performed by the district courts. All

¹ Cf. Court Organization Act, §§ 1 *et seq.*

other kinds of courts act only on appeal. There are different denominations for the district courts in regard to their functions in matters of non-contentious jurisdiction, like the land registration office (Grundbuchamt), the guardianship court (Vormundschaftsgericht), the probate court (Nachlassgericht), etc., but this is merely a matter of nomenclature and does not mean that the district courts have different functions or special procedure in regard to such business.

The jurisdiction of a district court in a given matter is not regulated by general rules; it depends on the character of the transaction. The domicile of the person whose interests are in question generally establishes the jurisdiction. The procedure is analogous to that in contentious civil matters. But all forms of restrictions in contentious matters are here more or less abolished. The German contentious procedure is ruled by two fundamental maxims. It must be oral and public. This means that the court is only permitted to know what has been communicated to it orally. Information by writing is not, in principle, taken into consideration. And all oral communication must be made in open court, in public. Neither principle is applied to non-contentious jurisdictional matters. Here the judge takes any information that he regards necessary and the proceedings are not open to the public. Applications by individuals are made in writing or by declaration before the clerk of the court. In contentious matters the action of the court generally depends upon a petition of the parties. In non-contentious jurisdictional matters the question whether the courts will act of their own motion (*ex officio*) or only on application depends on the character of the given matter. When public interests prevail, as in matters of guardianship or administration, the court acts *ex officio* and cites the parties. Other acts serving merely the interest of individuals, like registration of land and the recording of marriage agreements, are done only on application.

In regard to evidence the German procedure has not so many restrictions and rules as exist in this country; the court may regard what are treated in the English law as irrelevant facts and hearsay when they are deemed important. Of course there are certain rules, especially in criminal procedure, but they are very few compared with the English system. In non-contentious jurisdictional matters the judge is free and acts without restrictions. The statute says: "the court has *ex officio* to take any evidence

which it deems fit for the ascertainment of the given facts."¹ For this purpose every district court in Germany is obliged to respond to a request made to it by any other court.² Accordingly it is apparent that the judges, in performing functions of non-contentious jurisdiction, have a great deal of freedom. On the other hand, their responsibility is greater here than in contentious matters. The general rule of the law is that any person who wilfully or negligently without legal reason injures the life, body, health, freedom, property, or any other right of another, is bound to compensate him for any damage arising therefrom.³ This rule has been modified in favor of the courts in contentious matters as follows: if an official commits a breach of his official duty in giving judgment, he is not responsible for any damage arising therefrom unless the breach of the duty is punishable with a public penalty to be imposed by criminal proceedings.⁴ But in matters of non-contentious jurisdiction the law says that if an official wilfully or negligently commits a breach of an official duty incumbent upon him as to a third party, he shall compensate the third party for any damage arising therefrom. If negligence only is imputable to the official, he cannot be held liable unless the injured party is unable to obtain compensation elsewhere.⁵ In both cases, contentious as well as non-contentious, the duty of an official to make compensation does not arise when the injured party has wilfully or negligently omitted to obviate the injury by making use of a legal remedy.⁶ Because of their liability for negligence it is not unusual in Germany for the officials charged with non-contentious jurisdiction, especially land registration, to take out insurance for their protection.

The decrees in matters of non-contentious jurisdiction may be referred to the superior court on appeal. In the higher courts the whole procedure is nearly exclusively in writing and in chambers. The decrees of the superior court given on appeal can be referred to the courts of appeal, but only when a violation of law is alleged to have been committed by the superior courts, and not for errors in fact. This appeal for error of law is, in Prussia, not referred to the different courts of appeal, but exclusively to the court of appeal in Berlin (Kammergericht). In Bavaria, these appeals go exclusively to the court of Munich.

¹ Non-Cont. Jurisd. Act, § 12.

² Civ. Code, § 823.

³ *Ibid.* al. 1.

⁴ *Ibid.* § 2.

⁵ *Ibid.* § 839, al. 2.

⁶ *Ibid.* al. 3.

The decrees of the courts of appeal in matters of non-contentious jurisdiction are final. The supreme court has generally no opportunity to give its opinion in this branch of law, but there is an important exception showing how in the modern German law the customary or common law is developed by statutory provision. The court of appeal to which a matter of non-contentious jurisdiction has been referred for an alleged error in imperial law is not allowed to deliver an opinion different from what has been given before by another court of appeal or by the supreme court. If this opinion seems erroneous, the court of appeal sends the records to the supreme court, asking it to decide.¹ This statutory provision may appear to have sometimes a curious result, because the opinion of a higher court in a given matter binds the lower court only in that matter, and the lower courts are not prevented from following subsequently a different rule if persuaded that the opinion of the higher court given in a previous matter is wrong. The courts of appeal cannot do this, but must ask the supreme court to decide.²

IV. PRINCIPAL SUBJECTS OF NON-CONTENTIOUS JURISDICTION.

1. *Registration of Real Rights.* The German law of real property is governed by the following rules:

(a) Every parcel of land held as private property has a separate folio in the land register of the district in which the land lies. Several parcels belonging to the same owner may be registered under the same folio. Each folio has three separate divisions: the first for the registration of ownership; the third for hypothecary or similar charges; the second for other encumbrances, *e.g.*, easements. No private real right exists, in principle, that is not registered. The person in favor of whom real rights are registered is presumed to be the owner of these rights.³

Registers of the kind provided by the Civil Code and the Land Registration Act do not at the present time exist in all districts of the German Empire, but proceedings for their introduction have been begun. Judicial officers are appointed for that purpose, holding their terms in the districts where the registers are to be intro-

¹ *Cf.* Non-Cont. Jurisd. Act, § 28. A similar provision exists in contentious jurisdictional matters. Court Organization Act, § 137.

² Germany has, today, 1942 district courts, 176 superior courts, 29 courts of appeal, and the supreme court in Leipzig. Statistisches Jahrbuch für das deutsche Reich, 1907.

³ Civ. Code, § 891; Land Registration Act, §§ 3, 4, *et al.*

duced, citing all owners of real rights as known to them by tax registers, maps, old ownership registers, or any other information, to appear before them to declare their rights and show their titles and other evidences. After these proceedings are finished, public notice and individual citation is given and evidence is taken, the land register is installed, and the person who failed to make appearance within the given period is precluded from making further application. If contests arise before the land registrar, he is not, of course, entitled to decide, because he acts as an officer of non-contentious jurisdiction, but the parties have to go to the ordinary courts. These contests, however, do not prevent registration; but when registration is made in favor of one party, any objection to its correctness (*Widerspruch*) taken by the other party is also entered upon the register. If the contest is subsequently decided by final judgment, the successful party may make an application to the land registration office to cancel the whole inscription or merely the objection to its correctness.¹

(*b*) The transfer of ownership or the creation, modification, or release of a real right is effected by the combined operation of two acts; namely, a real agreement between the parties and the registration of this agreement.² Therefore a real right is not created when there is no registration, and, on the other hand, the registration does not create a real right when there was no agreement between the parties, or when this agreement was void for any reason. But the registration authorities are generally not bound to inquire into the existence or validity of the real agreement. They are, as a rule, entitled to make the registration when *the one party* whose right is to be encumbered, transferred, modified, or released, gives his consent. This consent can be declared before the judge or can be given in a written authorization duly acknowledged and proved.³

The judicial examination, before registration can be ordered, embraces the validity of the written instruments presented and all points regarding the personal capacity of the declarant. For instance, a guardian has to file his written authorization by the guardianship court, the heir has to file his certificate of heirship issued by the probate court, an agent has to present his document showing his powers of attorney in due form of law, etc.⁴

¹ Cf., e. g., Prussian ord. regarding land registration, Nov. 13, 1899, art. 29.

² Civ. Code, § 873. There are some exceptions in case of inheritance, compulsory sale, etc.

³ Land Registration Act, §§ 19, 29.

⁴ *Ibid.* §§ 36, 29, etc.

(c) In favor of a person who acquires a real right, the entries of the land register are deemed to be correct, unless an objection to their correctness is registered or the incorrectness is known to the acquirer.¹ In this point the German law of real property differs from the law of personal property. In the use of personal property the non-owner can transfer a good title to the *bona fide* acquirer when he gives him the possession, unless the thing has been stolen from the owner or has been lost; but this qualification is not applicable to transfers of money or of instruments payable to bearer or of things sold at public auction.² As regards real property even the thief may transfer a good title. Suppose, for instance, A wishes to give to B a mortgage on his land and prepares for this purpose his written consent to it and application for registration, duly acknowledged and proved, but later he does not come to an agreement with B; thereupon B steals the written instrument, and without A's knowledge takes it to the land registry office and, by showing A's written consent, gets the mortgage registered. B does not, of course, acquire any title, because real rights can be created only by registration and agreement, and here there was no agreement. But he may transfer his registered mortgage to a *bona fide* purchaser, and if this transfer has been registered, title to the mortgage is acquired by this person's reliance on the correctness of the land register.

To avoid this danger the Land Registration Act prescribes³ that every inscription must be communicated to the owner and to all interested persons, but the owner and these persons may relieve the court of this duty in a given matter, and that is the common practice. If therefore, in the above illustration, A, in his written consent, had relieved the registration office from communicating to him the inscription of the mortgage, he would hear of the transfer by the thief to the *bona fide* purchaser only after the latter's registration, and so would have no opportunity to cancel the latter's rights.

It thus appears that the registration in many cases creates rights, even when there is wrongful act or error of an individual. If the mistake is made by the land registration officials, they are of course not entitled to correct their errors, and thereby to modify rights acquired by individuals relying on the accuracy of the land register, but the law provides that the judge, on discovering that a former mistake has been made in the registration of the land, shall inscribe,

¹ Civ. Code, § 89a.

² *Ibid.* § 935.

³ Land Reg. Act, § 55.

ex officio, an objection to the correctness of the registration (Widerspruch von Amtswegen), thereby excluding *bona fides* after this objection has been registered.¹ This is all the officer can do. Later proceedings are in the hands of the interested parties, who are notified of the objection. They may bring a lawsuit for the cancellation of this objection or of the whole inscription, and the rectification of the land register can only be made after a judgment has been given or all parties agree.

The state is responsible to the individual for any defaults of the land registration officers in the performance of their duties. The officers are not directly liable to the individual, but they are compellable to reimburse the state for the amounts paid by the state because of their default.

2. *Matters of Guardianship.* As long as the father lives or the mother lives and, being a widow, remains unmarried, a guardian is not appointed except for special reasons. Therefore guardians as a rule are appointed for children both of whose parents are dead, or for illegitimate children. The guardianship court in all these matters acts *ex officio*. To enable the court to perform these duties, the registrars of births, marriages, and deaths, being administrative officers, are obliged by law to communicate to the guardianship court every case becoming known to them in which the appointment of a guardian is necessary.² The same duty is imposed upon the municipal orphans' councils, — local authorities created to assist the guardianship courts through their familiarity with localities and persons.³

The guardians are appointed by the court after they have taken oath of office, and letters of guardianship are granted to them. Generally the guardians do not have to give any security. There is no special need of this because they are continually controlled by the court. They have to file their accounts every year to be examined by the court, and there are a great many acts which they cannot do without special judicial authorization.

Analogous provisions are given for the appointment and control of guardians of insane persons, curators of absentees, curators of a posthumous child, and the like. The parents of minor children are not under control of the guardianship court; but in the management of their children's estates sometimes authorization by the court is prescribed.⁴

¹ Land Reg. Act, § 54.

² *Ibid.* § 49.

³ Non-Cont. Jurisd. Act, § 48.

⁴ Civ. Code, §§ 1640 *et al.*

Besides this the guardianship court acts in many matters of a different character. Thus the court has power to grant to a minor over eighteen years of age the rights of a person of full age when it is for his best interests.¹ Adoptions must be ratified by the court.² When for certain purposes the husband needs the consent of his wife, or when the wife in the management of her own property needs the authorization of her husband, and this authorization in the one or the other case is refused for frivolous reasons, the court can give the authorization instead of the refusing party, thereby establishing the validity of the transaction in question.³ Matters of this character are apparently contentious, and ought logically to be settled by lawsuit and judgment, but the German law prevents husband and wife from bringing their domestic quarrels of an unimportant or frivolous character before the open court and the public, and so makes the guardianship judge the legal adviser in domestic affairs.

3. *Functions of the Probate Court.* Letters of administration are not usually granted in Germany. In certain cases they may be issued, but this is exceptional. As the legal or testamentary heir directly continues the person of the deceased, the mere fact of the death makes him owner of the whole personal and real property, and the same fact makes him responsible to the creditors of the deceased. He may refuse to accept the succession by declaration in the probate court, which must usually be given within six weeks after his knowledge of the death. In such case the person who would become heir in case of the non-existence of the disclaiming heir immediately takes his place and continues directly the person of the deceased.⁴

The main functions of the probate court are as follows:

(a) Precautionary steps for the administration of the estate.⁵ Before acceptance of the inheritance the probate court takes all necessary measures for the preservation of the estate. The same rule applies when the heirs are known, but it is uncertain whether or not they have accepted the inheritance. The court may, for example, order the affixing of seals, the lodgment of money, negotiable instruments, and valuables, the drawing up of an inventory of the estate, and it may appoint a curator for the person who may prove to be the heir. The local police authorities

¹ Civ. Code, § 3.

² *Ibid.* §§ 1379, 1402, *et al.*

³ *Ibid.* § 1960.

⁴ *Ibid.* § 1741.

⁵ *Ibid.* §§ 1942 *et seq.*

must communicate to the court when it becomes necessary to take any provisional steps of the character mentioned.¹

(b) Opening and publication of wills. Any person who has in his custody a testamentary disposition is bound immediately on the death of the testator to deliver the instrument to the competent probate court.² The court sets a day for the opening and publication of such will, and must summon the statutory heirs and any known beneficiaries for such date. The will is then opened and published. All the contents of the will regarding beneficiaries who were not present at the opening must be communicated to them.

The object of these proceedings is not to create any presumption in favor of the validity of the will. The publication is in order to make known the testamentary heirs and to bring the fact of their nomination to their knowledge, so that they may exercise their right to repudiate the succession within the prescribed period. If the repudiation is made, the court notifies the next heirs.

(c) Procedure on partition of estates among co-heirs.³ In the Roman law, when disputes arose between co-heirs about the partition of the estate, the dispute was settled by a lawsuit.⁴ The German law developed a procedure by which the probate court had to compromise between the contesting parties. Lawsuits were brought only when this attempt of the court was without success. Analogous provisions exist now in the modern German law. If the co-heirs cannot come to a private agreement in settling the estate, they cannot begin a lawsuit, but must make an application to the probate court. The functions of this court in the subsequent procedure are strictly limited to non-contentious jurisdiction. The court merely states the assets and liabilities of the estate and the rights and shares of the co-heirs and other interested parties. If the co-heirs come to an agreement, they sign it, and the court ratifies it, thus giving to it the force of a final judgment. But when contests arise, the court merely states the contentious points, which are then settled by a lawsuit; and the proceedings in the probate court with regard to these points can be continued only after judgment is given.⁵

¹ Cf. Prussian Non-Cont. Jurisd. Act, art. 19.

² Civ. Code, §§ 2259 *et seq.*

³ Non-Cont. Jurisd. Act, §§ 86 *et seq.*

⁴ *Actio familiæ herciscundæ*, see Nussbaum, 124; 3 Dernburg, Pandekten, § 176.

⁵ Cf. Statute introducing the Civil Code, art. 147. The functions of the probate

(d) Certificate of inheritance.¹ As above mentioned, administrators and testamentary executors are appointed only in exceptional cases, and the opening and publication of wills establishes nothing as regards their validity. On the other hand the land registration courts, when applications are made by pretended heirs, are obliged to examine into their legitimate rights, and when they register rights in realty in favor of wrong heirs the state becomes responsible for damages. Like duties are imposed upon savings banks, governmental officials who are asked for pensions of a deceased person, and the like. So there must be a way for these authorities to ascertain the right heirs. This is done by the certificate of heirship given as well to legal as to testamentary heirs by the probate court. The applicant for a certificate has to state the date of the testator's death, the relationship upon which his right of inheritance is based, whether any person excludes him from succession, or any will exists, and whether any action relating to his right of inheritance is pending. All these declarations must be given under oath and be justified by public documents; for instance, as regards birth, marriages, and death. The court takes all evidence necessary to ascertain the facts, and makes the co-heirs join the declaration of the applicant, and also swear under oath. When the court is convinced of the correctness of the alleged facts, it issues a certificate of heirship. The legal effect of this certificate consists in the presumption that the person who is named as heir in the certificate has the right of inheritance therein stated, and any *bona fide* person transacting business with the stated heir is protected. Therefore, when the certificate of heirship has been obtained by error or perjury, the wrong heir can transfer the title to a *bona fide* third person. Provisions are made to cancel the certificate when its incorrectness becomes known.

4. *Registration for Different Purposes.*

(a) Marriage contracts. Marriage in Germany has no effect upon the estate of the husband or the wife as to the title of property; but on the completion of the marriage the property of the wife becomes subject to the management of the husband, who takes the revenues of this property as a contribution for the

court of the last-described character are in nearly all German states more or less thoroughly performed by notaries who act to that extent as probate courts, with power and authority given by law.

¹ Civ. Code, §§ 2353 *et seq.*

maintenance of the family. Things intended exclusively for the personal use of the wife, like clothing, ornaments, and working implements, and various other things are exempt from the management of the husband, and remain the separate property of the wife. All personal property which is in the possession of the husband or of the wife, except the wife's personal outfit, is generally presumed to belong to the husband.¹

The legal state of affairs can be modified at any time by marriage contracts between husband and wife; either wholly excluding the management of the wife's property by the husband or, on the other hand, creating a more or less complete community of property. The change of the legal state of affairs is made by the agreement and nothing further is necessary. But any third party, if *bona fide*, is entitled to assume that the statutory rule applies and is therefore protected, unless the modification or exclusion of the statutory régime is registered in the prescribed manner in the district court of the domicile of the husband.²

(b) Commercial matters. The German Commercial Code has the character of a special statute enacted on the basis of the Civil Code and amending or enlarging its provisions for the purpose of giving greater facilities for the transaction of purely commercial business. In so far, merchants, their agents, commercial partnerships, or share companies, may be regarded as a class favored by the law. On the other hand, persons taking part in commerce are subject to certain legal restrictions which do not exist in the general civil law. Merchants doing a large business must file the signature of their firm, with any further details, in the district courts where their main establishment or any branches are located. Powers of procuration given to commercial agents must be filed, and similarly commercial partnerships and share companies must be registered.³ The purpose of this registration is to make known all persons and corporations engaged in commercial transactions, and to protect all persons who rely on the correctness of the commercial register. The registration of the share companies has even a greater effect. It creates the corporation. Persons neglecting to file their application for registration can be fined by the district courts.⁴

(c) Mines and ships must be registered in the district courts.

¹ Civ. Code, §§ 1363 *et seq.*

² *Ibid.* § 1435.

³ Commercial Code, §§ 29 *et seq.*, 53, 106, 200, *et al.*

⁴ *Ibid.* § 14.

Registration is governed by principles similar to those applicable to the registration of land.¹

(d) Artistic models are only protected when registered in the competent district court.² The registration of patents and trade-marks is not done by the district courts but by the patent office in Berlin.³

The effect of registration, as shown above, varies in different cases and depends upon statutory provisions. Sometimes the registration creates a mere presumption of the existence of the registered rights or facts; *e. g.*, the registered owner or the stated heir is presumed to be entitled to his rights. Or the registration protects third persons who deal with the registered persons and rely on the correctness of the register; as in the case of the commercial or marriage register. This protection sometimes goes so far as to give to third parties a legal title where their grantor was registered without legal reason, as in the case of the land register or certificate of heirship. In this case the register is said to have public faith (*öffentlicher Glaube*). Or by registration the right is protected against violation or limitation, as in the case of artistic models. Or, finally, by registration, the right in question is created; as in the case of share companies, or of real rights which are created by the combined operation of agreement and registration.

All legal requirements have to be examined before the judge orders the clerk to make an inscription of the right in question. As we have seen, if negligent, the judge makes himself responsible.

5. *Judicial Authentication of Instruments.* Written statements are used in law for a double purpose: either to facilitate the proof of the facts therein stated, without the necessity of calling witnesses, (*Beweisurkunden*), or to create the validity of the stated rights which would be void if not made by instrument (*dispositive Urkunden*). This latter purpose of creating rights by written statements was unknown to the old Roman law, where documents were only used for proof; but in the Roman law after about the fifth century, instruments constituting rights came into use.⁴

Instruments are of two kinds: writings authenticated by public act and private writings. The origin of the first kind is to be found

¹ Mines are regulated by state laws. *Cf.* Statute introducing the Civil Code, art. 67. As regards ships, see Statutes of June 22, 1899, June 15, 1895, *et al.*

² Artistic Models Copyright Act of Jan. 11, 1876, § 9.

³ Patent Act of April 7, 1891; Trade Marks Act of May 12, 1894.

⁴ Brunner, *Zur Rechtsgeschichte der römischen und germanischen Urkunde*, 147, 61.

in the law of the Franks, where already the court, besides other officers, was invested with the power of authentication.¹

The modern German law shows three kinds of instruments:

(a) Writings under hand (private Urkunden). The form of a written statement is necessary; *e. g.*, for the contract of suretyship, for the acknowledgment of debts, etc., which would be void without that formality. Witnesses, sealing, and delivery are usually not required for the creation of such rights.

(b) Writings acknowledged before a public official (öffentlich beglaubigte Urkunden). The law prescribes that some written statements be acknowledged before a judge or a notary. The acknowledgment consists of the statement given by the judge or notary that the signature of the instrument has been given or acknowledged in his presence. This form of written statement is generally prescribed for the purpose of inscription in public registers.²

(c) Instruments authenticated by public act (öffentliche Urkunden). The public act consists of declarations made before a judge or notary who takes the record of it. Therefore this authentication is not limited to the signature, but covers the whole transaction. This form is generally required for transactions relative to family relations or creating inheritance rights.³

The Civil Code in prescribing the form of public acts generally gives a choice between authentication by judge or by notary, but the states are entitled to give these functions to the notaries only,⁴ and this has been done in many parts of Germany.

The foregoing description covers only the main functions of the district courts on matters of non-contentious jurisdiction, and does not claim to be complete. Besides this, the district courts act in contentious matters.⁵ Their jurisdiction in criminal matters includes all police contraventions and a number of misdemeanors. In civil matters their jurisdiction generally depends upon the value of the object in question. At present their jurisdiction goes to the value of 300 marks, but a bill has been prepared which would enlarge their jurisdiction to the value of between 600 and 1200 marks.

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¹ Schroeder, *Lehrbuch der deutschen Rechtsgeschichte*, 255.

² Land Registration Act, § 29; Commercial Code, § 12 *et al.*

³ *E. g.*, Civ. Code, §§ 1434, 2371.

⁴ Statute introducing the Civil Code, art. 141.

⁵ Court Organization Act, §§ 23, 27, 75.

DUE PROCESS OF LAW AND THE EIGHT-HOUR DAY.

THE actual words of the Fourteenth Amendment are these: "nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." In the Fifth Amendment the last clause is omitted. In the Constitution of Massachusetts, "Part the First, XII," are the words, "And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land." In the Petition of Right, 3 Car. I, c. 1, 1628, IV, it was recited that in the 28th of Edward III it had been enacted that no man "should be put out of his land or tenements, nor taken, nor imprisoned, nor disherited, nor put to death without being brought to answer by due process of law." Finally Magna Carta in the twenty-ninth chapter has it: "No Freeman shall be taken or imprisoned, or be disseised of his freehold or liberties, or free customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we pass upon him, nor condemn him, but by lawful judgment of his Peers, or by the Law of the Land." Lord Coke's gloss¹ reads: "1. That no man be taken or imprisoned but per legem terrae, that is, by the Common Law, Statute Law, or Custom of England."

The history of how these declarations came to apply to statutes passed by representative assemblies is not of consequence now, for they have come so to apply beyond peradventure. It is also not of consequence that the "liberty" guaranteed by the Fourteenth Amendment has come to mean the right to pursue one's individual purposes as one likes and to make contracts for that end. There can be little doubt that so to construe the term "liberty" is entirely to disregard the whole juristic history of the word.² At present the construction which includes within it the

¹ 2 Inst. 45 *et seq.*

² Mr. Charles E. Shattuck in 4 HARV. L. REV. 365. Mr. E. Parmelee Prentice in his book on the Commerce Clause seeks to support historically the modern interpretation, but the instances he gives are either literary or philosophical, or they seem to

"liberty" to make such contracts as one wishes has become too well settled to admit of question without overturning the fixed principles of the Supreme Court.¹ If it was, as it seems to me, an usurpation, successful assertion has sealed its title, and we need not quarrel with it, unless we are historically inclined or prone to revolutions.

But the meaning of the words "due process of law" or "the law of the land" has not become settled.² Consequently, when a law forbids all persons or a class of persons to make contracts exactly as they like, we may know certainly that it does "deprive" them of their "liberty," but we may not certainly know whether such deprivation was "due process of law." Much has been written about this, but I mean to consider only what "due process of law" means when the statute has regulated the hours in a day or week during which specified classes of persons may contract to work.

First, the words might mean that "due process of law" was only "customary or common process of law." When applied to legislative acts, from that aspect it can only mean, whether the subject-matter was such as was usually and commonly regulated by legislatures in those communities from which we have inherited our law. If it was common and accepted for the legislature to control the wage contract, then a statute affecting the wage contract was "due process of law." If that were the test, all such statutes would be valid, because it has been a common form of statutory regulation for several centuries.³ It is true that such regulation has commonly been directed towards regulating wages, but no one would distinguish between the right to fix wages and that to fix the hours of work.

With the beginning of the nineteenth century and the spread of those ideas of governmental non-interference which used to be

distinguish between freedom from personal restraint and other ideas. Mr. Shattuck's article in this REVIEW leaves no reasonable doubt of the meaning of the word as used in constitutional law at the end of the eighteenth century.

¹ *Booth v. Illinois*, 184 U. S. 425; *Lottery Case*, 188 U. S. 321, 357; *Allgeyer v. Louisiana*, 165 U. S. 578.

² *Davidson v. New Orleans*, 96 U. S. 97; *Ballard v. Hunter*, 204 U. S. 241, 255.

³ 5 Eliz., c. 4; 20 Geo. II, c. 19; 31 Geo. III, c. 11, § 3; 6 Geo. III, c. 25. While the subject of workmen's "conspiracies" was of course quite distinct, it still has enough relation to the matter of wages to make the subject-matter of near kin to their regulation. 33 Edw. I, st. 2; 3 Hen. VI, c. 1; 39 & 40 Geo. III, c. 106. Apparently the first statute for the regulation of wages by the Justices of the Peace was 5 Eliz., c. 4.

called *laissez faire*, the dominant economic theory forbade any regulation of the wage contract. The conditions of factory life, at first in England and later in this country, soon forced the hand of the more doctrinaire economists, and we began to have statutes regulating the conditions of factory life and of life in mines. Logically it would have been impossible under the theory of the *laissez faire* economists to defend such regulations, for they indubitably "deprived" the worker of his "liberty" to work under such conditions as he saw fit. The only process of law accorded him was the fiat of the legislature which forbade him and his employer to contract as they pleased.

To distinguish between the regulation of the conditions of factory life and the regulation of the hours of labor required one of two courses: either the court must have abandoned the theory that the customary character of the legislation determined its constitutionality; or it must have held that, though the regulation of such general conditions was customary, the regulation of the hours of work was not. But the regulation of such conditions was not customary prior to the nineteenth century, because, largely speaking, there were no factories. Besides, the theory of the customary powers of the legislature does not mean that a precise precedent must be found for every statute. The regulation of the wage contract in respect of the amount of wages was certainly a valid precedent for its regulation in respect of the hours of labor, if it was a precedent for its regulation in respect of the general conditions of factory life.

The actual result has been the acceptance of the first alternative and the interpretation of "due process of law" in quite another sense from that suggested. There have been many decisions¹ construing the words as meaning the usual and customary process of law, but, in regard to statutes regulating the wage contract, the question of the customary character of the regulation is no longer considered except in the case of seamen's contracts.

In abandoning this interpretation of the words, there arises, however, this difficulty, that the courts will not concern themselves, or at least profess not to concern themselves, with the expediency

¹ *Murray v. Hoboken Land Co.*, 18 How. (U. S.) 272; *Head v. Amoskeag Mfg. Co.*, 113 U. S. 9; *Warts v. Hoagland*, 114 U. S. 606; *Robertson v. Baldwin*, 165 U. S. 275; *St. Louis & San Francisco Ry. v. Mathews*, 165 U. S. 1; *Patterson v. Bark Eudora*, 190 U. S. 169.

or propriety of the statute in question, which they insist must always remain a question for the legislature only. The judicial declarations upon this matter leave no shadow of doubt as to its recognition.¹

Therefore some other test must exist than the judgment of the court upon the wisdom of the particular act in question. The obvious alternative was to assert that there were certain subject-matters of possible control within which the legislature was free to act as it thought best, and that when it passed an act which in fact did regulate those matters the act was due process of law. At first the courts said that in matters which actually, and not merely colorably, affected the public health and morals, or safety,² the legislature might act as it thought best and the courts could not declare their statutes not to be due process of law. But it soon became apparent that if the legislature was in fact forbidding the freedom of contract in relation to matters not within the fair meaning of the public health and safety, either the scope of that meaning must be enlarged, or the legislature would be shorn of its power to do many things which were highly necessary. Under the stress of this compulsion the court therefore enlarged the scope of that meaning, until at the present time it has been defined as including the public "good" or "welfare" in general, and even the public "prosperity" or "convenience."³

Unless, however, the terms "welfare" and "convenience" are to be defined so arbitrarily and unreasonably as to leave no basis for their general application and therefore to make them inapt for use as principles of guidance, it is clear that they include all those matters which the legislature can desire to regulate at all. It is true that in the supposed furtherance of the public welfare and convenience the legislature may enact what has in fact the precise opposite of the effect which they intend, and that they may, indeed, make that "welfare" and "convenience" the mere color for stat-

¹ *Mugler v. Kansas*, 123 U. S. 623; *Crowley v. Christensen*, 137 U. S. 86; *Atkin v. Kansas*, 191 U. S. 207, 223; *Cotting v. Kansas City Stock Yards*, 183 U. S. 79, 110.

² *Mugler v. Kansas*, 123 U. S. 623; *Booth v. Illinois*, 184 U. S. 425; *Powell v. Pa.*, 127 U. S. 678; *Jacobson v. Mass.*, 197 U. S. 11; *Mo. Pac. Ry. v. Mackey*, 127 U. S. 205; *Barbier v. Connolly*, 113 U. S. 27; *New York, etc., R. R. Co. v. Bristol*, 151 U. S. 556; *Johnson v. So. Pac. Co.*, 196 U. S. 1.

³ *Escabana Co. v. Chicago*, 107 U. S. 678; *St. Louis Iron Mountain Ry. v. Paul*, 173 U. S. 404, 409; *Lake Shore & Mich. So. Ry. v. Ohio*, 173 U. S. 285, 296, 297; *Lochner v. People*, 198 U. S. 45, 57; *C. B. & Q. Ry. v. Drainage Comrs.*, 200 U. S. 561, 592; *Bacon v. Walker*, 204 U. S. 311.

utes by which they corruptly mean to accomplish no result of the kind. In the first case, however, the court must consider the expediency of the statute, which they have so often declared they should not do; and in the second they must question the integrity of a coördinate branch of the government, as to which there is an obvious and insuperable impropriety.

The logic of this situation made necessary, therefore, some further principle of interpretation for the words, "due process of law," than that based upon the definition of certain general fields of legislative power within which the legislature might act freely, and the court have nothing to say. If there were no such added principle of determination, the court must abdicate its function of declaring a statute not "due process of law," — provided no arbitrary methods of its administration were prescribed — or it must return to the interpretation of which *Murray v. Hoboken Land Co.*¹ was an instance, and only examine whether the legislature was in fact acting as legislatures had always been accustomed to act in English-speaking communities. To adopt the second of these would have been to abandon precedents at that time established, and it would have been in addition — and this was more important — to have admitted the validity of much legislation which the justices were personally convinced was erroneous economically, and despotic politically.

There was in fact no alternative, therefore, but to take the bull heroically by the horns and declare that the court could and did have the power to examine the expediency of the measure and to determine whether it had in fact in their judgment any relation to the purposes and objects which it was designed to effect, and, as those purposes and objects were not ordinarily set forth, to any purposes and objects which the court recognized as legitimate. The court did do this frankly enough, and the necessary result has been great divergence of constitutional decision and an apparent absence of actual principle upon which such cases can be determined.

It is not, however, necessary that the consideration by the court of the expediency of a statute should be such as would be given if the whole question were before it as a legislature in the first instance.² It may well determine those things to be within the range of legislative power against which, sitting as legislators, the

¹ 18 How. (U. S.) 272.

² *Mugler v. Kansas*, 123 U. S. 623; *Booth v. Illinois*, 184 U. S. 425, 430; *Otis v. Parker*, 187 U. S. 606.

justices individually would have voted. The nearest analogy for the function of the court is the function of a court in review of a verdict on the facts. Only in those cases in which it is obvious beyond peradventure that the statute was the result, either of passion or of ignorance or folly, can the court say that it was not due process of law.¹ In this way the principle may be observed that with the expediency of the statute the court has no concern, but only with the power of the legislature.

There will, I believe, be little difference of opinion as to the analysis hitherto of the court's position in regard to the interpretation of "due process of law." The question is not so much of the principle as of its application. It would be out of place in this paper to consider the political results of this function of the court as so developed, for the question goes far beyond the mere matter of eight-hour laws. Whether it be wise or not that there should be a third camera with a final veto upon legislation with whose economic or political expediency it totally disagrees, is a political question of the highest importance. In particular it is questionable whether such a power can endure in a democratic state, while the court retains the irresponsibility of a life tenure, and while its decisions can be reversed only by the cumbersome process of a change of the federal Constitution. While there seems to be no question of the desirability of the judicial irresponsibility arising from life tenure — a tenure indeed which it would seem as though no judge could fail to desire and, if he could, to insist upon — and while there can also be little question of the undesirability of turning a constitution from the fundamental frame of government into a statutory code, still, if the court is to retain the absolute right to pass in the final result on the expediency of statutes passed by the legislature, the difficulty is inherent and in the end it may demand some change, either in the court or in the Constitution.

The question of the applicability of the theory, as it has been developed, to eight-hour laws must unfortunately depend upon the temper in which the justices constituting the court actually approach the question. If the decision is to depend in each case upon the opinion of the members of the court as to whether the ends sought by the statute are in themselves desirable, and as to whether the means prescribed are well adapted to those ends, it is clear that

¹ *Henderson v. Mayor*, 92 U. S. 259, 268; *Minnesota v. Barber*, 136 U. S. 313, 320; *Hennington v. Georgia*, 163 U. S. 290, 304; *Booth v. Illinois*, *supra*; *Jacobson v. Mass.*, 197 U. S. 37

the decisions in one case have little value as precedents in another. Further, it is clear that if certain justices have fixed opinions upon economic theories, they must necessarily be opposed to any statutes which violate those theories, and that they will be justified in continually voting in accord with those theories. A vote of the court necessarily depends not upon any fixed rules of law, but upon the individual opinions upon political or economic questions of the persons who compose it, and though in the course of time precedents will be established upon a large number of questions, to which presumably thereafter all members of the court will give the deference due to decisions, those precedents will not have the force of instances of a general principle, but of precedents upon precisely the questions which were decided. While there is perhaps nothing inherently or inevitably necessary in such a result, since the court might extend the logical consequences of a decision beyond the precise question which it decided, yet, in fact, the result has been otherwise, as may be shown by the decisions themselves.

Under the definition of "liberty" which is now the law, a statute which provides that no men engaged in a particular trade shall work for more than eight hours, except in special emergencies, must of course come within the Fourteenth Amendment, unless the act be due process of law. That question is whether or not the court can see any reasonable relation to any purpose which reasonable men may think desirable for the public welfare. If the court can see such a purpose, then it must hold that there has been due process of law; if not, the law is, of course, void.

Under strict Benthamite theory, all such laws were idle and vicious: idle, because the whole wage contract was controlled by factors over which the collective will of the community had no control; vicious, because it put restraint upon the "natural" and inevitable adjustment of industry. But that theory was necessarily abandoned by the courts when they tolerated many statutes regulative of the wage contract, not only when the regulation concerned "health" and "safety," but even when it sought to make more equal the relative economic advantages of the two parties to the wage contract.¹ Such laws, quite as much as laws regulating hours or wages, take from the individual his right to determine for himself the terms under which he may be willing to contract.

¹ *Missouri Pac. Ry. Co. v. Mackey*, 127 U. S. 205; *Knoxville Iron Co. v. Harbison*, 183 U. S. 13; *St. Louis Iron Mountain Ry. v. Paul*, 173 U. S. 404. See *Holden v. Hardy*, 169 U. S. 366, 397; *Schlemmer v. Buffalo, etc. Ry.*, 205 U. S. 1.

They put into the power of the legislature and its agents the control of his "liberty" to do as he likes with his own.

In short, it is too late for the adherents of a strict *laissez faire* to condemn any law for the sole reason that it interferes with the freedom of contract. Similarly it is no reason to declare invalid such acts because they may work to the disadvantage of individuals of exceptional strength or skill, a favorite reason given by some judges for such decisions. If this were a reason, it must apply equally to the statutes which prescribe safety appliances, which are often unnecessary for individuals of unusual prudence and watchfulness; and it must also apply to many sanitary statutes which prescribe minimum conditions of healthfulness, which are unnecessary to persons of singular robustness.

Each case must depend, therefore, on the particular purpose which it serves and the means adopted to fulfill the purpose.

An eight-hour law does not in fact aim solely at protecting the health of the employees. But it does not follow that, because the statute has a different actuating purpose, it has no true effect upon the health of those whom it touches. Sixteen hours of work would of course be more than any but the strongest could endure. Twelve hours under most factory conditions would probably be too much for the preservation of the health of most men, and would result, as unhappily most conditions of working life do result, in a premature ageing of those who assume it. Just what the limit is which will permit the worker best to preserve his vigor and to allow him the variety of activity and the relief from the monotony of specialized labor which is essential to actual health, is a difficult question to answer. No doubt the only answer possible could be found from extended statistical inquiries for which it is quite likely that the materials are not now at hand. But under the principles laid down by the court, it is neither essential, nor indeed relevant, to answer such an inquiry; for if the regulation has any possible relation to the correct solution, then the judicial question is answered and closed.

It seems very strange that a court should have decided that the limit of eight hours had in fact no such relation and could have no justification as a possible limit to put upon a working-day.¹ It is not of course in the least strange that a court should regard an act which put such a limit upon a working-day as inexpedient, or

¹ *Lochner v. People*, 198 U. S. 45.

unwise, because that is a matter upon which men differ very widely, just as they do upon the policy which would make any regulation whatever of the working-day, or of the mode of payment, or of the amount of wages. However, to repeat the distinction, it is one thing to disapprove the measure, and another to put it outside the pale of rational entertainment.

The consideration of the effect upon the health of the persons affected is, however, by no means the only one which is relevant, because, as we have seen, if the measure may possibly promote the "welfare" of the public, then it is valid. There would seem to be so direct a relation between the welfare of a worker and the hours of his work that no doubt could be raised about it, yet in *Lochner v. People*¹ it was held that it did not exist. It is clear that so to hold, the court must have included within the term "welfare" the question whether on the whole the class affected would be benefited or hurt. *Muller v. Oregon*² and *Holden v. Hardy*³ went directly upon the fact that the hours of labor had an effect upon health, at least among women or miners and smelters; it was not necessary after deciding that to consider whether the act affected the "welfare" of the workers. But in *Lochner v. People* it was first held that the limitation of the working day did not affect the health of bakers as it did of miners and smelters; and then it was necessary to hold that it had no relation as well to the general "welfare" of the bakers. No reason for such a decision can exist except that upon the whole the class affected will do better without legislative regulation of any sort than with it.

That is, there can be no question that such a regulation actually affects the "welfare" of the persons within its terms; but there may well be a question whether, all things considered, it affects them beneficially, or, if beneficially, whether it does not do so at a corresponding expense arbitrarily imposed upon other persons. In other words, it cannot be urged that the subject-matter is not within legislative purview, but it may be urged that the legislature has acted improperly within its proper field. But it must be shown that the "welfare" of the persons affected was so clearly and obviously injured, or, if furthered, was so unjustly furthered, that no one could reasonably believe it expedient; in other words, that it was either absurd or oppressive.

If, however, such a statute is of no more oppressive or absurd

¹ 198 U. S. 45.

² 208 U. S. 412.

³ 169 U. S. 366.

a character than others of admitted validity, it is not void. It is therefore unnecessary to examine the expediency, even with the most favoring eye, of such a statute, except relatively.

To shorten one's hours of routine manual work is of itself a benefit, unless it entails a corresponding diminution of pay. To insure one's safety and health might be no greater benefit, to which it would also be a drawback if the pay were decreased. Whether or not a decrease of wages would counterbalance a reduction of hours depends upon the degrees of each, and it is the same question whether such a decrease would counterbalance certain regulations for health or safety. That the state should take out of the individual's hands his choice as to the working conditions of his life, many no doubt would regard as "a meddlesome interference with the rights of the individual," if it correspondingly reduced his pay. That it should forbid him to work, for instance, fourteen hours a day, would certainly be no more despotic or unwarranted. As between the two, judged merely by the kind of matter which is regulated, there is no reason for permitting the one which does not hold good of the other in a proper case. A man's "time" is his life, and to control it is to control what is often dearer to him than his health or his personal safety. Even if the legislature were limited in its power over "liberty" to the subjects of "health" and "safety," there would not be a valid ground of distinction, but as it is not — nor indeed can it be — there is no such inevitable disproportion of interest between the hours of work and health and safety as makes the one indifferent, and the other vital, to the wage-worker.

But may it not be that to cut down the hours of work is to force those who work to take less pay for an enforced leisure they may not want? Perhaps so, but the same reasoning applies in the case of safety appliances and factory regulation. In the first case, if the worker is paid in proportion to his production, he will lose in pay what he gains in time. In the second case, upon the same reasoning, the cost of factory regulation raises the price of the commodity, and so shuts off a part of what economists call the "effective demand." Whether that kind of reasoning is as true as Holy Writ, or whether it is a vain scholastic exercise, it is applicable to either case, and shows that in both the worker pays for what he gets.

And if it is so, there seems no good reason why the state should not compel the exchange of a shorter day for shorter wages, if it

may compel an exchange of a safer work-shop for such wages. No doubt, each is "paternal," but "ce n'est que le premier pas qui coûte," and that was taken long since.

Suppose, however, that the theory may not be true that such regulations must be paid for *pro tanto* in a reduction of wages. It may be that every advantage in living conditions generally brings with it a corresponding increase in efficiency, or, if not a corresponding, at least some, increase. This is the trades-unionist theory,¹ and no one can with justice dismiss it with an appeal to the "interference with the rights of the individual," who will not go to the consistent extreme and condemn all such interferences generally. That such a theory may conceivably be true ought to be conceded. The indirect effects upon the morale of workers and the stimulus to improvement in the technique of the arts arising from a shorter day may indeed be enough to make up economically for their apparent decreased production. If so, then, viewed from the most narrow economic effects, the total result of the restriction will be beneficial to their welfare, and will entail no corresponding injury to any one else. This is an opinion which certainly may be entertained, and that, I submit, is as far as the court can inquire.

If, however, the theory be wrong — and it certainly is as yet quite unproved — and if the resultant loss be made to fall upon the capitalist — as the more militant trades-union theory asserts — is that fact enough to make the statute invalid? If so, there must be some constitutional necessity that the state should leave untouched the whole economic struggle. That is, however, not the case, as the laws against usury alone prove beyond question.² Even

¹ Sidney and Beatrice Webb, *Industrial Democracy*, Pt. III, c. III, (d) 715-740.

² The instance of usury laws is so apt that it is easy to overestimate the importance of it. Such laws, were they enacted today, would probably be declared void by any court which would declare void an eight-hour law. Not only do they interfere very directly with the "freedom to contract," but they have no support in policy from any reputable economic authority. Their existence is therefore a glaring instance of the extent to which the legislature may lawfully go. But in the case of such laws not only is it true that they are thought wise by many reasonable persons, but they represent a theory which had an unbroken heredity upon the statute-books in those states in which they survive, long antedating the Constitution. *Laissez faire* never succeeded in destroying them, even in its prime, and today the current has set in the other direction. It is this history, therefore, which puts them beyond fear of attack. Still, they do remain as the most salient example of the power of the legislature to attempt to equalize the relative advantages of contracting parties, simply because one is needy and the other is not, and they show at least that in that case the Constitution permits such interference.

in *Adair v. United States*¹ the court goes no further than to say that membership in a union does not of itself have any relation to the welfare of the parties to the wage contract. Whether that be true or not, the decision does not assert that if it had some relation which made for the benefit of the workers at the expense of the employers, the legislature could not favor the workers. In *Knoxville Iron Co. v. Harbison*² the opinion certainly contemplated the equalization of the relative advantages between the parties. The court says:³

"Its tendency, though slight it may be, is to place the employer and employee upon equal ground in the matter of wages, and, so far as calculated to accomplish that end, it deserves commendation."

If a statute requiring wages to be paid in cash is valid on that account, there can be no distinction against one which has the same end in view in limiting the hours of work. The same reasoning seems necessary to support *St. Louis Iron Mountain Ry. v. Paul*,⁴ in which a statute was sustained providing that a discharged employee could recover all his wages earned to date. For the state to intervene to make more just and equal the relative strategic advantages of the two parties to the contract, of whom one is under the pressure of absolute want, while the other is not, is as proper a legislative function as that it should neutralize the relative advantages arising from fraudulent cunning or from superior physical force. At one time the law did not try to equalize the advantages of fraud, but we have generally come to concede that the exercise of such mental superiority as fraud indicates, has no social value, but the opposite. It may well be that the uncontrolled exercise of the advantages derived from possessing the means of living of other men will also become recognized as giving no social benefit corresponding to the evils which result. If so, there is no ground for leaving it uncontrolled in the hands of individuals. Long since, the ownership of property which is devoted to certain public purposes has been limited by the state, even when the state has given no special franchises to its owner.⁵ By an analogy, which was not perhaps conscious, the ownership of factories and certain other forms of capital is likewise now attended with certain

¹ 208 U. S. 161.

² 183 U. S. 13.

³ P. 20.

⁴ 173 U. S. 404.

⁵ *Munn v. Illinois*, 94 U. S. 113; *Budd v. New York*, 143 U. S. 517

limitations special to such owners, as has been shown. It was at one time thought, and it is yet thought by some persons, that if the owner of such property keep within the limits of fraud and force, it is best not to meddle with him. No one can be insensible to the implications in a denial of his absolute rights. They involve social activity which may be used to destroy the initiative of the individual and those diversities between individuals which are the source of emulation and ambition. Yet no one today denies that to a certain degree we must face that possibility and answer the problems which it raises, with such wisdom as society can collectively muster. The question for the courts is not whether the problems have been wisely answered, but whether they can be answered at all, or whether they are taboo. So far as concerns laws limiting the hours of work, the present position seems quite untenable. Even assuming that women are not physically the equal of men,¹ the arguments against any regulation whatever of hours apply equally to men as to them. If the whole matter is dependent upon what is vaguely called "supply and demand," and if to favor an economic class in one way imposes on it some corresponding loss in another, it is because no deliberate and "artificial" change can make head against economic laws which work regardless of the individual, or the social, will. There are indubitably strong arguments in favor of such a position, but there are also cogent arguments *contra*. If the arguments opposed are in any case allowed to have enough cogency to "raise an issue," each case is a matter for special consideration. There are some cases in which the courts have conceded that such an issue is raised, and that throws the whole matter open for exclusive consideration, and for exclusive determination, by the legislature, unless the court is to step out of the rôle of interpreter of the Constitution and to decide the questions itself as another legislature.

In short, the whole matter is yet to such an extent experimental that no one can with justice apply to the concrete problems the yardstick of abstract economic theory. We do not know, and we cannot for a long time learn, what are the total results of such "meddlesome interference with the rights of the individual."² He would be as rash a theorist who should assert with certainty their

¹ *Muller v. Oregon*, 208 U. S. 412.

² *Lochner v. People*, 198 U. S. 45, 61.

beneficence, as he who would sweep them all aside by virtue of some pragmatism of "natural rights." The only way in which the right, or the wrong, of the matter may be shown, is by experiment; and the legislature, with its paraphernalia of committee and commission, is the only public representative really fitted to experiment. That the legislature may be moved by faction, and without justice, is very true, but so may even the court. There is an inevitable bias upon such vital questions in all men, and the courts are certainly recruited from a class which has its proper bias, like the rest. Indeed the legislature, though less courageous because it is less independent, is more genuinely representative. At present it is prone to evade its responsibility by throwing off all the odium of opposition on the court. If it could not do so, it would be compelled to meet the question more squarely and more fairly; and we should not have the inconsistent spectacle of a government, in theory representative, which distrusts the courage and justice of its representatives, and put its faith in a body which was, and ought to be, the least representative of popular feeling.

"No evils arising from such legislation could be more far-reaching than those that might come to our system of government, if the judiciary, abandoning the sphere assigned to it by the fundamental law, should enter the domain of legislation, and upon grounds of justice or reason or wisdom annul statutes that had received the sanction of the people's representatives."¹

It is, therefore, in no sense as patrons or opponents of the wisdom of such efforts, that the courts may approach such laws. There no doubt comes a time when a statute is so obviously oppressive and absurd that it can have no justification in any sane polity.² If we are to abandon the theory that what is customary is

¹ *Atkin v. Kansas*, 191 U. S. 207, 223.

² It is, for example, no answer to urge dialectically that if an eight-hour law is valid, then a six-hour, four-hour, or two-hour law would also be valid. It is no doubt true that the court must consider in the end the real effects of the law. That does not throw open the actual statute for consideration as *res integra*. No one now seriously believes in a four-hour law. If the control of men over natural energy became so great that in four hours a man could produce commodities equal to what he now produces in eight, it might be rationally contended that his "welfare" would be promoted by that limitation. The political body to determine that, under such changed economic conditions, would be the legislature. At present the court could, and must, take notice of the actual economic conditions to the extent necessary to determine whether the provision is merely perverse and absurd. Such a conclusion cannot honestly be held

permissible, perhaps the question is no more than of the temper in which the court awaits that time. However, that time has not come when the matter which is before them is one upon which men can, and do, diverge widely, and upon which the deliberate judgment of great numbers of quite reasonable persons is at variance with the majority of the court. Before the court the question is political, not economic; it is the question of where the power to pass upon such subjects should rest, whether in the legislature or in the whole people acting through the Constitution. If the subject be one already fairly within the field of rational discussion and interest, it would seem to be for the legislature. Such a subject, I submit, is the possible wisdom of an eight-hour law.

Learned Hand.

NEW YORK.

when the limit is eight hours; nor has the court ever said this. They have overset the law by a relapse — if I may be pardoned the word — into the theory of “natural rights.”

UNIFORMITY OF LAW IN THE SEVERAL STATES AS AN AMERICAN IDEAL.¹

II. — STATUTE LAW.

OTHER decisions might be cited which, like *Lawrence v. Fox*, have led to uncertainty and confusion in the common law and created a need for legislation as the only available means of restoring consistency and certainty. Without stopping to multiply such instances, I will proceed at once to the consideration of statute law, and its probable effect upon uniformity of law in the several states.

If it were necessary to consider the entire body of statute law, the problem would certainly be discouraging.² A striking fact, however, in connection with statutes is that a large proportion of them relate to administrative law; that is, the body of law regulating the administration of the government through boards, commissions, or public officers. Under the same head belong all statutes relating to local administration through the agency of cities and towns. Although the legislatures have an undoubted right, subject to any limitations imposed by the state and national constitutions, to enact laws modifying the entire body of private law, including common law and equity, the use of this right in the past has been moderate. The great bulk of the private law of the country has been left by the legislatures to be declared by the courts. In England "nine-tenths of each annual volume of statutes are concerned with what may be called administrative law; and an analysis of the general acts during the last four centuries would probably show a similar proportion. On the other hand, at least nine-tenths of the leading rules which make up the law of contract and tort are common law, and their origin and development are to be found in the pages of the Year Books and Law Reports, and not of the statute book."³ Savigny in Germany

¹ Continued from 21 HARV. L. REV. 430.

² "The number of legislative enactments passed in the states in a single year has exceeded fourteen thousand, covering in printed form some twenty to twenty-five thousand pages. During the five years from 1899 to 1904 the total number of acts passed by American legislatures was 45,552." Reinsch, *Am. Legislatures*, 300.

³ Ilbert, *Leg. Methods*, 6, 209.

drew a distinction between the province of statute or positive law and that of jurisprudence which seems to correspond roughly with that adopted by Parliament as separating the field of common law and equity from that of statute law.¹ In the United States administrative law forms a large part of the entire body of statute law, as may be seen by reference to the general laws of any state. In Massachusetts, for example, of the two hundred and twenty-seven chapters which compose the Revised Laws of 1902, one hundred and twenty-six chapters are set apart under the heading "Of the Administration of the Government."

It should be noted also that the current of opinion in favor of collectivism, as it is called, or socialism, which is now running strong, if it is not actually dominant, tends to increase the amount of administrative law in the states. In 1901 the commissioners appointed to revise and consolidate the statutes of Massachusetts since 1882, stated that in the revision as reported by them, seventeen new titles were included, which had never appeared in any revision of Massachusetts laws. Out of those seventeen titles, seven bear evidence of the tendency of the state government upon various grounds to extend its activity, by doing itself work which previously had been left to cities and towns, by supervising and regulating professions and business which had previously been left without public supervision, and by authorizing cities and towns to carry on as public utilities work which previously had been left wholly to private enterprise.² All these activities rest more or less upon the fundamental assumption of collectivism — faith in the benefit to be derived from state intervention.³ Other statutes of the same class will be found under the headings Of the Regulation of Trade, the Police Power, and the Employment of Labor. These new activities of the state require an increase of administrative machinery in the form of boards, commissions, or other public officers, and engage more and more the attention of legislatures, leaving to them less time for legislation affecting private law.⁴

¹ Savigny, *Vocation of our Age for Legislation and Jurisp.*, Hayward's translation, 32 *et seq.*; 2 *Pol. Sci. Quar.* 119, 124, n. 2. See also 3 *Pol. Sci. Quar.* 136.

² Report of Commissioners, iv. The seven chapters are: c. 28, Of Public Parks and Playgrounds; c. 34, Of the Manufacture and Distribution of Electricity by Cities and Towns; c. 47, Of State Highways; c. 76, Of the Registration of Physicians, Surgeons, Pharmacists and Dentists; c. 83, Of the Protection of Infants and Care of Pauper Children; c. 84, Of the State Board of Charity; c. 88, Of the Massachusetts State Sanatorium.

³ Dicey, *Law and Opinion*, 258.

⁴ *Ibid.* 305, and n. 2.

For the purpose of considering statute law in relation to uniformity of law, all statutes relative to administrative law may be laid aside. One of the great advantages of local self-government through the agency of states is that each state may adopt those methods of administration which will secure the best results for its own people. Diversity in administrative law in the several states may be more desirable than uniformity.

In the case of private law, on the other hand, no argument is needed to prove that uniformity is desirable. Among a people as closely bound together as the people of the United States a large measure of uniformity in private law is not only desirable, but practically necessary. By private law is meant (speaking generally, without seeking the accuracy of scientific definition) the rules relating to contract, tort, property, family relations, succession, and inheritance.¹ This has been called "lawyers' law," in contradistinction to statute law.² The practical question is, what is the probable effect of legislation on the uniformity of this body of law in the several states?

In order to answer that question intelligently, it is necessary to know what the forces are which induce legislative action. A legislature is analogous to a court, with rules of procedure for the admission and despatch of business. Under the freedom of petition secured by American constitutions the people have practically an unlimited right to approach the legislature with petitions for new laws. In Massachusetts every year about thirteen hundred subjects are presented for legislative action, most of them by petition with an accompanying draft of bill. These petitions are of great interest as evidence showing what subjects are engaging the public attention. In most of the petitions only a small number of persons are interested, but a few of them are likely each year to attract the attention of the entire state. In order to be enacted as statutes or resolves each of the petitions must have behind it some power of public opinion or other power sufficient to move the law-making branch of the government to action. For

¹ The continental codes dealing with substantive private law, as the Code Civil in France, and the Burgerliches Gesetzbuch in Germany, deal with the following subjects, adopting with but little variation the divisions found in the Institute of Gaius: Law of Persons, including Family Law; Law of Things, or Property; Law of Obligations, including Contract and Tort; Succession and Inheritance. This corresponds generally with our system of common law and equity.

² "For lawyers' law Parliament has neither time nor taste." Ilbert, *Leg. Methods* 213.

this reason the annual Acts and Resolves show better than any other record extant what Massachusetts is thinking of and doing. This is true also of the legislation of the other states.

When the legislature is approached by bodies representing a well-formed public opinion, or which create the belief that they represent public opinion, a favorable hearing is almost sure to be granted. No legislature will long defy an aroused public opinion, whether that opinion is based upon reason or sentiment. The real difficulty of a legislator is that upon most of the questions upon which he is required to act there either is no definite public opinion, or it is not ascertainable. The general public are too much occupied with their private affairs to form opinions, or to make their opinions known, on the multitude of questions before the legislature. Persons having a private and special interest in proposed measures, or mere theorists, with no solid foundation for their petitions, by importuning legislative committees, often produce a belief that legislation is demanded by public opinion, for which there is in fact no real public support. As a general rule there is no public opinion in regard to proposed legislation affecting common law or equity. There will never be an uprising of the people either for or against the rule established in *Lawrence v. Fox*. Whether a third person shall be allowed to bring suit upon a contract made for his benefit is a question requiring technical knowledge for its solution, and is of interest only to the parties, and to lawyers, judges, and persons especially interested in the administration of justice and in the safe and symmetrical development of the common law. There is a professional or expert opinion upon the subject, but for most purposes what is called public opinion is a negligible quantity in relation to statutory changes in private law.

There is, however, a notable exception to this rule. Questions of private law which affect social or public interests as distinct from individual interests, such as the relation of employers and employees, or the right of association or combination, questions which touch moral, religious, or other sentiments, such as may arise in the criminal law or in the law of marriage and divorce or on the observance of the Lord's Day, involve a political or social element, and may at any time arouse public discussion which will result in general public opinion that may demand or oppose legislation. It is upon questions of this nature that legislation changing the rules of the common law has been most active. In England within twenty-five

years and in Massachusetts within fifty years the common law unity of husband and wife, and all the rules resulting from that unity, have been swept away by statute, almost completely.¹

Upon questions of private law which involve a political or moral element, and which attract public attention, every individual is free to petition for legislation; but upon those questions of private law which are wholly technical only experts are likely to petition for legislation, and there are some experts who are not free to petition. This results from the doctrine of the separation of governmental powers.²

First, in regard to the executive. In England the executive government is seated in Parliament, and any member of the government, being also a member of the House of Commons or of the House of Lords, can introduce a bill providing for legislative changes in the common law, with the support of the cabinet behind it.³ Under the American system, both in the state and federal governments, the executive may recommend changes by message, but cannot introduce a bill. A message from the executive is referred to the proper legislative committee, and when so referred, follows the usual routine. The governor cannot with propriety appear before the legislative committee, even if he can do so legally, for the doctrine of the separation of powers is regarded as of vital importance by the legislature and rigidly enforced.⁴ His power to induce affirmative action by the legislature is not great, except in the case of a governor of unusual tact and ability, and then his power comes from his personal qualities and not from the law.⁵ Governors do not often recommend statutory changes in the common law for the reason that such changes require technical knowledge, and are not usually of interest to the general public. On the other hand, the power of the executive to stop such changes

¹ Dicey, *Law and Opinion*, 394.

² See Massachusetts Bill of Rights, XXX.

³ Ilbert, *Leg. Methods*, 213, 222; 1 Bryce, *Am. Comm.*, 3 ed., 93.

⁴ The only instance known to me in which an American executive appeared before a legislative committee is that of Governor Butler of Massachusetts, who in 1883 appeared in person before a joint committee in the investigation of the Tewksbury almshouse, and conducted one side of the inquiry.

⁵ Professor Reinsch commends the leadership which some able governors have recently secured over legislatures, as "a symptom of a healthy development in our political system." *Am. Legislatures*, 285. Mr. Bryce says the separation of the executive from the legislative department is not a necessary incident of democratic government, citing the example of England. 2 *Am. Comm.*, 3 ed., 587.

by the use of the veto, which exists in all but two of the states, is very great.¹

Next, in regard to the judiciary. The judges, either as a body or as individuals, have never had, and are not likely to have, more than a slight influence in effecting legislative changes in private law. No regular method is provided by which the judges may approach the legislature as petitioners for legislation, and they cautiously refrain from any action which may expose them as individuals or the judiciary as a body to criticism for interfering with the legislative branch of the government. Occasionally a judge of extraordinary energy and activity, like Judge Story, may suggest changes in the law and prepare drafts of bills for the use of friends who are members of Congress or of a state legislature. The Crimes Act of 1825,² the Bankruptcy Act of 1841,³ and the Admiralty Jurisdiction Act of 1845,⁴ are probably traceable to his influence. It is open, of course, to legislative committees to request information from the judges, but this power is not often used. Practically under our system the whole benefit which might be obtained from the judiciary as an expert body in effecting changes in private law and improvements in the organization of the courts and the administration of public justice is lost to the legislature and to the public.

In England it is far different. "The earliest Acts of Parliament were drawn by one or more of the king's judges."⁵ After the Restoration the judges attended the sittings of the House of Lords and were occasionally employed to draft bills. Again the Lord Chief Justice and other eminent judges have for a long time had seats in the House of Lords, not *ex officio*, but as peers of the realm, with the right as members to introduce bills. To this fact may be traced many valuable acts reforming and improving the common law, such as Lord Denman's Act,⁶ abolishing incompetency of witnesses in civil actions from interest or from previous conviction of crime; Lord Campbell's Act,⁷ giving a remedy in damages for causing death by wrongful act, and many others. In Massachusetts a judge by accepting a seat in the legislature vacates his judicial office, under

¹ North Carolina and Rhode Island. See 1 Am. Pol. Sci. Rev. 200, 204. A governor of New York has twice prevented the enactment of the Field Civil Code by means of the veto, after it had passed both branches of the legislature.

² 1 Story, Life and Letters, 439.

³ 2 *ibid.* 407.

⁴ *Jackson v. The Magnolia*, 20 How. (U. S.) 296, 342, per Campbell, J. (1853).

⁵ Ilbert, Leg. Methods, 77, 78.

⁶ 6 & 7 Vict., c. 85 (1843).

⁷ 9 & 10 Vict., c. 93 (1846).

the eighth article of amendment to the constitution.¹ Finally, the Judicature Act of 1873² in section seventy-five provides for a council of judges of the Supreme Court to be held at least once a year, with a duty to report to the government what amendments or alterations it would be expedient to make, for the better administration of justice. A similar provision might be useful in the United States.

While the influence of the judges is likely to be small in legislation affecting the common law, that of the legal profession has been and is likely to be very great. The influence of the bar may be exerted in many ways. In the first place, the bar has unlimited right to petition for legislation. Again, every legislature has a judiciary committee composed wholly or almost wholly of lawyers, and the report of a judiciary committee upon a legal subject is usually of great weight. Sometimes individual members of the legislature who are lawyers acquire leadership and influence of controlling importance. A remarkable instance of such influence is the case of Stephen J. Field, brother of David Dudley Field. In 1848 Stephen J. Field removed from New York to California. As a member of the judiciary committee of the first legislative assembly of that state, he exercised a controlling influence over its legislation, and thus secured for the Field codes the beginning of their career in the West.³ Finally, lawyers may appear as counsel before legislative committees and a powerful argument before a legislative committee may often be more momentous to the common law than an argument before a learned court.

The power of the bar over legislation affecting the common law is in reality the power of expert opinion. Very few important statutes originate in the legislature.⁴ As a rule, they are prepared by commissions specially appointed to investigate and report upon a subject. Sometimes they are prepared by an administrative board, sometimes by private petitioners, who have expert knowledge upon the subject of the petition. Legislation affecting the common law always requires technical knowledge, and the work of legislative committees in the case of any important statute upon that subject will consist principally in hearing arguments for or

¹ *Com. v. Hawkes*, 123 Mass. 525 (1877).

² 36 & 37 Vict., c. 66.

³ Preface to Revised Codes of North Dakota, 1895, 18. Mr. Field was afterwards a justice of the Supreme Court of California, and later of the Supreme Court of the United States.

⁴ Reinsch, *Am. Legislatures*, 275.

against bills prepared outside the legislature, and in suggesting alterations and amendments.¹ The responsibility of deciding for or against proposed legislation remains with legislative committees and the legislatures, but their tendency is to be guided on technical subjects by expert opinion. Except for the small but influential body of teachers of law, whose influence is just beginning to be felt practically upon legislation and other matters pertaining to the law, the only body of expert opinion available for the legislature upon legislation affecting uniformity of law is that of the bar. If the bar is united and active for or against a proposed measure of that character, its opinion in most cases will be controlling.

The powerful influence of the bar on legislation affecting the common law is a fact which tends to secure uniformity in such legislation. Another important fact in favor of uniformity is the legislative tendency to follow precedents, and to adopt or copy the statutes of other legislatures. It is true that the doctrine of precedents as applied in common law courts has no application in a legislative body. Each successive legislature in a state is free to act as it pleases except as restrained by the constitution. It is also true, however, that legislatures are much influenced by their own former action, and the action of their predecessors. Any lawyer who has had experience in a legislative body must have been struck by this phenomenon. It exists in the English Parliament,² and in the continental law courts,³ though the very important doctrine that precedents are of binding quality remains a peculiarity of the common law.

More important than the tendency of legislatures to follow their own precedents is the ease and readiness with which they adopt and enact the work of other legislatures. A striking example is the Statute of Frauds, enacted in 1677 in England, and adopted in nearly all of the United States. Another example is the Employers' Liability Act, enacted in England in 1880, and adopted

¹ In Massachusetts within the past twenty years the following important statutes were drafted outside the legislature, nearly all of them by commissions: Employers' Liability Act, 1887, c. 270; Metropolitan Sewerage Act, 1889, c. 439; Metropolitan Park Act, 1893, c. 407; Metropolitan Water Act, 1895, c. 488; Negotiable Instruments Act, 1898, c. 533; Land Registration Act, 1898, c. 562; Street Railway Act, 1898, c. 578; Act to Simplify Criminal Pleadings, 1899, c. 409; Act Relative to Business Corporations, 1903, c. 437; Insurance Act, 1907, c. 576; Warehouse Receipts Act, 1907, c. 582.

² Dicey, *Law and Opinion*, 46 and 368, n. 1.

³ 19 Green Bag 460: Dicey, *Law and Opinion*, 485.

with little alteration in Massachusetts in 1887. The most striking exhibition of this tendency is the spread of the Field Code of Procedure. It was enacted in 1848 in New York. Within five years similar codes were enacted in Missouri, California, Iowa, Kentucky, Minnesota, Indiana, and Ohio. Within twenty-five years the Field Code had been enacted in substance and often in its very letter by sixteen other American commonwealths.¹ In 1897 this procedure was in force in twenty-seven states and territories. The wide and rapid spread of the Code of Procedure indicates, no doubt, a deep dissatisfaction with the pleading and practice previously in force, but it also illustrates the boldness and readiness with which the legislature of one state will adopt an important statute which comes to it indorsed by the approval of the legislatures of other states. The Field Civil Code, on the other hand, which deals with substantive private law, has had no such success. It was adopted by Dakota in 1865, without revision by a commission, with such modifications only as were suggested by legislative committees.² That code was adopted also in California in 1872. Georgia has a Civil Code adopted in 1860; but the movement for general codification of the substantive civil law has never made much progress in the United States.

On the other hand codification of different parts of the substantive commercial law is now going on with a rapidity which resembles that of the Field Code of Procedure. A uniform Negotiable Instruments Act has been enacted in thirty-five states and territories and the District of Columbia; a uniform Warehouse Receipt Act in nine states; a uniform Sales Act in one territory and three states; and bills are in preparation for uniform laws on Bills of Lading, Certificates of Stock, and Partnership.³

In addition to the natural demand for uniformity in commercial law two powerful agencies have assisted this movement in favor of partial codification of commercial law. One is the American Bar Association, organized in 1878, and having as one of its objects the promotion of uniformity of legislation throughout the Union. The other is the National Conference of Commissioners on Uniform State Laws, which meets annually at the same time and place

¹ Hepburn, *Hist. Development of Code Pleading*, 87 *et seq.*, 114.

² Revised Codes of North Dakota, 1895, Preface, v.

³ In England three similar codifying measures have been enacted: the Partnership Act, 1890, drawn by Sir Frederick Pollock; the Bills of Exchange Act, 1882, and the Sale of Goods Act, 1893, both drawn by Mr. M. D. Chalmers.

as the American Bar Association. The Conference is made up of commissioners appointed by different states, and thirty-nine states and territories and the District of Columbia now have such commissioners.¹ The combined influence of these two bodies, with the influence of the Association of American Law Schools, which also meets annually at the same time and place, is a force of the first importance in securing uniformity of legislation in the states. In conclusion, as the result of this examination of the method in which legislative bodies do their work, and of the forces which govern their action, it is plain that uniformity of private law is more easily and surely attainable from the action of legislatures than from the action of the courts. The corrective action of the courts, when once a diversity in case law appears among the several states is slow and uncertain, while that of the legislatures is prompt and sure. The courts are obliged to wait until some case is presented for decision in the ordinary course of litigation before they can act. The action of the legislature may be invoked at any time. It does not follow, however, from these considerations, that the friends of uniformity of law should favor the enactment of statutes or codes which invade the province of case law. A comparison of the merits and defects of the two systems must first be made.

III. — CASE LAW VERSUS STATUTE LAW.

It is an historical fact that the legislature has for centuries left a large portion of the private law to be declared by the courts. A sound legislator, whenever legislation is demanded which amends or abolishes a rule of case law or which codifies case law and puts it in the form of a statute, will require the petitioner to show cause why he should vote in favor of such demand.

1. The courts in litigated cases, by the examination and cross-examination of witnesses under oath, have better means of discovering the facts than are available in a legislative hearing. The facts proved in court arise directly from the life and transactions of the people, and rules made by experienced judges with direct regard to those facts are more likely to be just and adapted to each case than general rules framed by statute upon such statements of fact as are usually made before legislative committees.

2. The courts have the benefit of the assistance of counsel in

¹ See Proceedings of Seventeenth Annual Conference and Address of Pres. Amasa M. Eaton, Portland, 1907.

declaring the law, and the safeguard of criticism by an expert body of professional opinion. This was an efficient protection against arbitrary action on the part of the Roman praetor,¹ and it is an efficient protection against arbitrary action by a common law court.²

3. The judges are required to state the reasons for their decisions under their own names. Responsibility for case law is fixed and definite, while in the case of legislation, under the committee system, there is a great want of definite responsibility.³

4. Case law is based upon principle, has historical continuity, and aims at logical symmetry and consistency in all its parts. Statutes also, in all legislation worthy of the name, are based upon principle. As a rule, however, each statute stands by itself, upon its own *ratio legis*. To a lawyer the relation between statute law and common or case law may be likened to the relation between a dictionary of the English language and a masterpiece of English literature; for example, *Paradise Lost*. Each work may be conceded to be invaluable. Each word in the dictionary stands by itself, and all the words when read together convey no connected meaning to the ordinary mind.

5. The legislature is more closely in touch with the electorate, or political sovereign, than the courts. While this fact has great advantages, it has some disadvantages. The legislature can enact promptly in a statute the deliberate public opinion of the electorate, but it is also in danger of mistaking mere temporary emotion for deliberate public opinion. Not every current of public feeling which passes over a community is worthy to be enacted into law. It is an advantage to the community that case law develops slowly. It is controlled by reason, and protected against gusts of passion or sentiment by the method of its growth.

6. Case law is useful as a basis for legislation when the principle of the cases has been developed to its full extent, and the needs of the community require a modification of the principle, or the introduction of new rules based upon new principles. Thus the legislature both in England and in the United States in dealing with the property rights of married women had the benefit of the rules worked out during centuries in the courts of law and equity. So in the law of master and servant, the mass of litigation over the

¹ Moyle, *Inst.*, 1 ed., Introduction, 31.

² *United States v. Hudson*, 7 Cranch (U. S.) 32, per Johnson, J. (1812).

³ 4 *Proceedings Am. Pol. Sci. Ass'n*, 71 *et seq.*

rule in *Farwell v. Boston & Worcester R. R.*¹ is of great value to the legislature as a basis for legislation modifying the rule to meet new conditions. In like manner, if the law relating to the right of association or combination should be promulgated in the form of a statute, the legislature would derive great aid from the efforts of the courts to declare the law in accordance with common law principles. The community, in short, is better served when private or case law is left to the courts, and legislation is confined to administrative law, and to dealing with new political or economic or social conditions which common law or equity cannot meet.

Legislation affecting the common or private law may be divided into two classes. The first is when diversity of decision has arisen among the several states upon subjects in which uniformity is desirable. In such cases the object of legislation is to restore uniformity by stating the principles of the common law correctly in the form of a statute. In regard to such statute, as shown above, it is comparatively easy to obtain the favorable action of many legislatures, and to secure uniformity. The greater difficulty is to preserve uniformity. It is, of course, of fundamental importance that such statutes should, to begin with, be well drawn; but however well drawn they may be, they are exposed to two dangers: amendments in the state legislatures, and diverse interpretations by the courts of different states. The best protection of the Negotiable Instruments Act and of all other uniform statutes against both of these dangers is the same — the faithful study of the great cases expounding the principles of the common law, commercial law, or whatever the subject in hand may be, and the logical application of those principles by counsel and courts in their daily work to all concrete cases. The way to preserve the benefit of uniform statutes is the same as the way to escape from the danger of the multitude of precedents; that is, a reliance upon original reasoning based upon the true principles of the common law. If the law schools of the country, which now have practical control of legal education, send to the bar lawyers who are thoroughly grounded in the systems of common law and equity as contained in the leading cases in England and America, the uniformity and consistency of the law will be preserved, whether the law is stated in the form of cases or of statutes. Such lawyers will be a powerful influence with the courts against diversity of rules both in case law and in

¹ 4 Met. (Mass.) 49.

the construction of statutes. In the legislatures of the country they will stand against petty and needless amendments to statutes. The want of this influence has had much to do with the dissatisfaction which now seems to exist with the working of codes of procedure in the so-called code states.¹ Returning for a moment to *Lawrence v. Fox*, the greatest evil of such a decision is not that it creates a need for invoking the aid of the legislature, but that it unsettles the science of law. It breaks the continuity of legal development. Resting upon no common law principle, it brings confusion and uncertainty to other common law principles. Every principle or rule in the law which has been relied upon to support *Lawrence v. Fox* has been made the subject of more or less looseness of thought and expression as a result; *e. g.*, agency, trust, novation, subrogation, gift. In the absence of a principle, counsel cannot predict with confidence under what circumstances a third person can maintain an action upon a contract for his benefit. He must find a case exactly similar in its facts to that of his client.² The effect is to substitute for the science of law the science of cases—rules for obtaining quickly and thoroughly all cases just like the one in hand—and in time to destroy the faculty of applying legal principles boldly and accurately to new combinations of concrete facts.

The other class of legislation affecting private law is where the legislature for reasons of policy enacts laws which aim not merely to state accurately or codify the common law, but to modify the common law; or laws which introduce new principles or rules having no connection with the common law. These may be called statutes in the strict sense—not declaratory acts, but commands, making new law. *Lex est quod populus jubet atque constituit.*³ The

¹ "The Bar Association has also set on foot a movement to revise that legal monstrosity known as the Code of Civil Procedure, but whether good or ill will be accomplished by the result, none of us, I take it, care to predict at the present moment. . . . Certain it is that we will not be able to get any code that is satisfactory to anybody so long as each individual member of the legislature finds it necessary to have passed two or three separate amendments to relieve constituents who are embarrassed by present litigation." 24 Reports, N. Y. State Bar Association, 294. See Hepburn, *Hist. Development of Code Pleading*, Introduction, xi.

² For the condition of the law in regard to the right of third persons under a contract between a water company and a city or town by which the company agrees to supply the inhabitants of the city or town with water, see 3 Mich. L. Rev. 501; 4 *ibid.* 540; 5 *ibid.* 362; *Guardian Trust, etc., Co. v. Fisher*, 200 U. S. 57; *Pond v. New Rochelle Water Co.*, 183 N. Y. 330.

³ Gaius, I, 1, § 2.

office of the courts in regard to this class of legislation is wholly that of interpretation. In the multitude of statutes which the legislatures are now putting forth there are many which belong to this class, and the function of the courts as interpreters of written laws seems likely to be more conspicuous in the future than it has been in the past. This involves no diminution of dignity or power in the judiciary, nor does the work of interpretation require less knowledge of legal science than the work of declaring the principles of common law and equity. It is in the field of interpretation that judicial genius has won its greatest triumphs. The whole body of constitutional decisions consists of the interpretation of documents framed and ordained by the people. The whole body of patent law is practically the construction or interpretation of a statute by the courts.

When a statute modifies the common law, as for example the Employers' Liability Act, in order to interpret it and apply it soundly it is necessary to know what the common law rule was before the statute and also to discover and enforce the meaning of the legislator as expressed in the statute. This two-fold office is often extremely difficult, and is made more difficult when the legislator on his part does not thoroughly understand the rule which the statute modifies. Thus, there is reason to fear that the Massachusetts legislature did not fully understand the common law duties of employers in passing the Employers' Liability Act,¹ and Professor Dicey hints that Parliament, or some of the lawyers by whom Parliament was guided, did not fully understand the principles of equity which they meant to follow in enacting the Married Women's Property Acts.² It is probably true that lawyers and judges are in danger of being biased by professional habits and feeling in construing statutes which conflict with common law or equity, or which rest upon new views of economic or social policy. Such danger exists also among scientific jurists on the Continent.³ It can fairly be affirmed, however, that English and American judges have risen above this bias in the performance of their offi-

¹ *Ryalls v. Mechanics Mills*, 150 Mass. 190, 195 (1889).

² Dicey, *Law and Opinion*, 395.

³ Cf. the strong expression of Savigny in regard to the *Lex Julia et Papia Poppaea*, A. D. 9. This law was aimed by Augustus at the evil of childlessness, and affected the Roman law of inheritance and other parts of the Roman private law for centuries. Savigny says: "That enactments of this kind easily become a baneful corruption of the law, and that they should be most sparingly employed, must strike any one who consults history." *Vocation of Our Age for Legislation*, Hayward's translation, 32.

cial duty and have honestly enforced the law. In England, where the judges are appointed during good behavior, a leading writer says: "But the action of the courts is to be judged in the light, not of a few petulant or captious criticisms by individual judges, but of their general course of conduct; and they have as a rule loyally adhered to their function of being not critics of the legislature, but interpreters of the law."¹ In the United States, where the judges are elected directly by the people in all but eleven states,² there is no practical danger of want of judicial sympathy with new legislation, whether simply modifying the common law, or based upon new economic or social theories and introducing rules unknown to the common law.³ In the field of interpretation, as elsewhere, the best guide to sound and just results is a profound knowledge of the principles of the common law.

The quality of the law depends at last upon the quality of the work done in making and declaring it. The responsibility for case law rests primarily upon the judges; for statute law upon the legislatures; but the influence of the bar upon both forms of law, as I have endeavored to show, is a factor of vast importance. An American bar inspired with a love for the common law, and well grounded in its principles, is a force more essential to the uniformity of law in the United States and to a sound development of the law than the enactment of uniform statutes or codes. It is also more difficult to obtain. To produce and maintain such a bar requires long co-operation by all the law schools of the country upon a general plan of education and the steady leadership of the courts in adhering to sound principle even when opposed to precedents.

It is, of course, too late to seek to restore unity in detail between the common law of England and that of America, but it would certainly be useful and instructive if some scholar would collect the cases in which American courts have departed from English rules, and show what good or evil has come from the diversity. Was it a great gain for the law when *Lawrence v. Fox* was decided in New York, or when *Nichols v. Eaton* was decided at Washing-

¹ Ilbert, *Leg. Methods*, 7.

² 1 *Am. Pol. Sci. Rev.* 205.

³ See *Municipal Control of Public Utilities*, . . . a study of the attitude of our courts toward an increase of the sphere of municipal activity, in 25 *Columbia University Studies in History*, etc. The author concludes "that the attitude of our courts favors a decided increase in the sphere of municipal activity." P. 110.

ton?¹ The same judge who wrote the opinion in *Nichols v. Eaton* also wrote the opinion in *Lovejoy v. Murray*,² a case which has been admired as an example of independence and original power; but would not the opinion have been a stronger opinion if the sources of the common law as now brought to light by legal scholars could have been explored?³ *Parker v. Foote*,⁴ which refused to recognize the English easement of light as unsuited to the growing cities and towns of this country, was probably decided wisely, but in view of present conditions it seems that something may be said upon the other side.⁵ Again, in respect to procedure, which reacts powerfully upon substantive law, has America done wisely in departing so soon and so radically from the common law? There was no doubt need for reform, but was there any real need for haste?⁶ The reformed code procedure, its friends assert,⁷ has been adopted in substance in England. If so, it will be well for American as well as English lawyers to reflect upon some words of warning from Bishop Stubbs. Referring to the Judicature Act, he says:

"It yet remains to be seen whether this amended system, easier and less intricate than the old, supplies as good material for training or provides as sound schools of lawyers. It is no doubt philosophically more capable of perfection. The lore of Coke and Selden, like the lore of Elden and Stowell, is for the present at a discount. Of course, looking on all this with a historical eye, one is apt to be a little disconsolate; but time will avenge them, and the neo-legal jurisprudence will soon have an array of reports and decisions that will outweigh, physically at least, the Year Books and Institutes."⁸

Amid the rush of precedents and statutes it is well to pause and study the foundations upon which the law really rests. The great

¹ 91 U. S. 716 (1875).

² 3 Wall. (U. S.) 1 (1865).

³ See Professor Maitland in 1 L. Quar. Rev. 324 and 2 *ibid.* 481; and Dean Ames in 3 HARV. L. REV. 326, the Disseizin of Chattels.

⁴ 19 Wend. (N. Y.) 318 (1838).

⁵ "The enormous height of American buildings, which has caused them to be nicknamed 'sky-scrapers,' is evidently one consequence of there being no easement of light to check their upward growth." 7 J. of Comp. Jurisp. 308.

⁶ "The official draft of the New York code, framed and filled in, as we have seen, with astonishing rapidity, was passed into an operating law no less quickly." Hepburn, Hist. Development Code Pleading, 87.

⁷ David Dudley Field in 1 Jur. Rev. 18, 22.

⁸ Lectures on Medieval and Modern History, Canon Law in England, 381.

lawyers who guided the American Revolution, framed the federal Constitution and the Judiciary Act and the constitutions of the original states, were trained in the common law and equity system of England. Their successors will make no mistake in following their example. Parliament in recent years has made great inroads by statute upon common law and equity, and the current English law reports are not so useful to American lawyers as English reports formerly were; but the ancient principles of law and equity in both English and American reports are as valuable as ever for discipline and for use. In the hands of a bench and bar trained from youth in those principles, cases and statutes, however numerous, whether the work in hand be the common law or the construction of statutes, will be simply the materials of a new jurisprudence that will surpass the old.

One further topic must be considered briefly — the relation between the state and the federal courts — in order to obtain a complete view of the subject of uniformity of law.

William Schofield.

BOSTON.

[*To be continued.*]

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RAILROAD RATE REGULATION AND SUIT AGAINST A STATE. — In a much forecasted decision the Supreme Court of the United States recently dealt an effective blow to a type of legislation which has been very prevalent recently. The legislature of Minnesota fixed rates for the railroads of the state, and prescribed heavy penalties of fine and imprisonment for each deviation therefrom. The federal circuit court enjoined the state attorney-general from proceeding under these statutes pending the decision of their constitutionality.¹ He disobeyed the injunction, whereupon the circuit court committed him for contempt. Alleging that the court was without jurisdiction to enjoin him, he instituted *habeas corpus* proceedings in the Supreme Court, but his petition was dismissed. *Ex parte Young*, March 23, 1908. The court took two steps: it found that the statutes were unconstitutional, and that the court had jurisdiction to issue the injunction. Regardless of the sufficiency of the rates, the court declared that the statutes violated the Fourteenth Amendment because, in effect, they prohibited a test of their validity, when the validity depended "upon the existence of a fact which can be determined only after investigation of a very complicated and technical character." Disobedience would involve the risk of such long imprisonment that agents would not disobey to test the validity; and if agents would take the chance, the railroads would run the risk of incurring in a day fines which would bankrupt them. This ground for overthrowing a statute is very uncommon.² Disobeying the statute, and then defending a prosecution on the ground of its unconstitutionality would

¹ For a discussion of this mode of proceeding, see 20 HARV. L. REV. 238.

² *Cotting v. Kansas, etc., Co.*, 183 U. S. 79, 100; *Ex parte Wood*, 155 Fed. 190, 196. See also the claim of the plaintiff, apparently unnoticed by the court, in *Fitts v. McGhee*, 172 U. S. 516, 517.

involve all the deterring risk that the court points out. But this very decision suggests another method of procedure — restraining the enforcement of the statute. This method is less burdensome, but it still has insurmountable drawbacks. If the company obeys the statute while the action is pending, it suffers irreparable injury if the rate is confiscatory. If it disobeys during this interval, it runs the risk of enormous fines, for if the rate is not confiscatory, the restraining order only postpones the suits under the statute.⁵

Most of the opinion was devoted to a re-examination⁴ of the question, whether the proceedings to enjoin the attorney-general constituted a suit against the state within the prohibition of the Eleventh Amendment. The Supreme Court has at various times adopted different constructions of this Amendment, from the strictest, that a suit is one against a state only when a state is a defendant of record,⁶ to the loosest, that its object is to prevent a state from being subject to coercive judicial process at the instance of an individual.⁶ A sound method of attacking the question was recently suggested in an address by Mr. William D. Guthrie.⁷ He adopted the English analogy of the Crown's immunity from suit with its complement, so essential to prevent injustice, of the responsibility as principal of the agent through whom it acted.⁸ The Amendment would seem to be satisfied if we give the state the immunity of the Crown. That construction would still leave its officers liable as responsible principals, thus affording individuals in this country the protection of their rights enjoyed by Englishmen. Our courts should hold officers personally liable when their acts constitute an illegal invasion of an individual's rights, remembering that under our theory of government an unconstitutional statute cannot legalize.⁹ Then, logically, equity should give its preventive relief when a threatened act would irreparably injure the plaintiff.¹⁰ However, we should observe this limitation, which has nothing to do with the Eleventh Amendment but is often confused with it: if the state is not joined when it is a necessary party in view of the relief demanded, the suit should fail because of the defect of parties defendant.¹¹ It is believed that practically all of the actual holdings¹² of the Supreme Court will be found reconcilable with the view thus outlined, and also most of the reasoning it has advanced at various times. Attorney-General Hadley, in arguing against the right of a federal court to enjoin

⁵ This is on the assumption that the court cannot legalize what the legislature has constitutionally declared illegal. The railroads, in another way also, are very badly off, for they were enjoined from obeying the statutes, the disobedience of which may later bring punishment upon them.

⁴ In late years the court has allowed such injunctions with little or no discussion of the question. *Prout v. Starr*, 188 U. S. 537. See *Fargo v. Hart*, 193 U. S. 490.

⁶ *Osborn v. U. S. Bank*, 9 Wheat. (U. S.) 738, 857.

⁶ *In re Ayers*, 123 U. S. 443, 505.

⁷ Reprinted in 8 Colum. L. Rev. 183-207.

⁸ *Feather v. The Queen*, 6 B. & S. 257, 296; 2 Goodnow, *Comparative Administrative Law*, 163 *et seq.*

⁹ See *Kilbourn v. Thompson*, 103 U. S. 168; *In re Tyler*, 149 U. S. 164; *Scott v. Donald*, 165 U. S. 58; *Tindal v. Wesley*, 167 U. S. 204.

¹⁰ *Virginia Coupon Cases* (*Allen v. Baltimore & Ohio R. R.*), 114 U. S. 311; *Scott v. Donald*, 165 U. S. 107; *Mechem, Public Officers*, § 995. Some cases apparently *contra* may be reconciled on the ground that the defendant is not threatening to do the act. See *Fitts v. McGhee*, *supra*.

¹¹ *Osborn v. U. S. Bank*, *supra*, 858; *Christian v. Atlantic, etc., Ry.*, 133 U. S. 233. The court will sometimes go a long way not to hold the state a necessary party. *Cunningham v. Macon, etc., R. R.*, 109 U. S. 446, 451.

¹² See 20 HARV. L. REV. 245.

a state attorney-general from enforcing a state statute violating the Fourteenth Amendment, propounds this dilemma: if his action is not state action, the Fourteenth Amendment does not apply; while if it is state action, the Eleventh Amendment forbids the suit.¹ The following is submitted in answer. The issue between the parties is whether the threatened act of the defendant has legal sanction, which depends on whether or not this is state action. That in turn depends on the constitutionality of the act, which is a federal question giving the federal courts jurisdiction of the suit, and thus they may enjoin in accordance with equitable principles.

LIABILITY FOR RECEIVERSHIP EXPENSES. — It is within the discretion of the court to appoint a receiver, to determine his compensation, and to fix the manner in which that compensation shall be paid. The court through its receiver administers the estate for the benefit of those ultimately adjudged entitled to it. Receivership expenses, however, differ from ordinary costs in that the administration is supposed to be worth its cost to the true owner,¹ and accordingly the general rule is that the receivership expenses are to be taken from the fund administered.² The difficult problem is to determine when the facts justify such a departure from the general rule as to relieve the owner of the expenses of an involuntary management and place the burden on the party who instituted the proceedings. It may, indeed, be impossible to charge the fund because the possession of the receiver was never legal, as when his appointment was absolutely void because of a statute,³ or when the property in question belongs to one not a party to the action.⁴ In such case it is clear that the true owner cannot be forced to submit to a reduction of the fund to pay the expenses of the illegal administration. As the receiver is equally innocent, it seems equitable to charge the expenses to the person who caused the appointment of the receiver.⁵ If, on the other hand, the appointment of the receiver under the circumstances was legal and proper, or, if erroneous, was acquiesced in by the defendant, the mere fact that the plaintiff eventually failed in his suit will not be enough to throw the expense on him.⁶ If, however, the plaintiff was fraudulent, there can be no objection to making him stand the cost.⁷ A more difficult class of cases is where the appointment was not justified on the facts presented and was vacated on appeal. The courts have reached all possible results on the liability for the receivership expenses incurred in the interim.⁸ It is submitted that the proper rule is first to protect the receiver by giving him a lien on the fund and then to let the

¹⁸ 66 Cent. L. J. 71, 74, 75.

¹ See *Porter v. Sabin*, 149 U. S. 473, 479.

² *Jaffray v. Raab*, 72 Ia. 335.

³ *Couper v. Shirley*, 75 Fed. 168.

⁴ *Howe v. Jones*, 66 Ia. 156.

⁵ *Ephraim v. Pacific Bank*, 129 Cal. 589.

⁶ *Ferguson v. Dent*, 46 Fed. 88. But see *City of St. Louis v. St. Louis Gas Light Co.*, 11 Mo. App. 237.

⁷ *Highley v. Deane*, 168 Ill. 266.

⁸ Receiver has no hold on the fund, *Pittsfield Bank v. Bayne*, 140 N. Y. 321; receiver has a lien on the fund, *Espuela, etc., Co. v. Bindle*, 11 Tex. Civ. App. 262; all expenses should be taxed against the plaintiff, *Myres v. Frankenthal*, 55 Ill. App. 390; running expenses should be taxed on the fund, but the receiver's commissions on the plaintiff, *French v. Gifford*, 31 Ia. 428.

defendant recover from the plaintiff any actual loss he may have suffered as a result of the receivership.⁹

A further question is presented when the funds prove insufficient to pay the receiver's expenses. Here, if the suit is not successful, as between the plaintiff and the receiver it seems equitable to make the plaintiff pay the expenses of the management of the property by the court. But if the plaintiff's claim is sustained, it takes extraordinary circumstances to justify charging him with the deficit. Thus, when by agreement certain money which would naturally have gone into the fund was paid directly to the plaintiff and the fund proved too small to cover the receivership expenses the plaintiff was rightly called on for the balance.¹⁰ But in the ordinary case the plaintiff should not be held, since the receiver is not the agent of the plaintiff but of the court itself. Accordingly the Supreme Court of the United States recently held that a creditor who had a receiver appointed over a quasi-public corporation could not be charged with the expenses of managing the property. *Atlantic Trust Co. v. Chapman*, 208 U. S. 360.¹¹ To justify holding the plaintiff there must be special circumstances which change the equities of the situation, or the plaintiff must have assumed liability either by an agreement between the parties¹² or under terms required by the court as a condition precedent to the appointment of the receiver.

THE EFFECT ON AN INSURANCE POLICY OF THE EXECUTION OF THE INSURED FOR A CRIME.—Nearly eighty years ago it was decided in England that, even though a policy of life insurance contains no provision avoiding it for death at the hands of justice, it is against public policy to allow recovery when the insured has been executed for a crime.¹ This doctrine has been approved by text-writers,² and has been followed in recent years by the Supreme Court of the United States.³ In fact it is first questioned in a recent Illinois decision which reaches the opposite conclusion.⁴ *Collins v. Metropolitan Life Ins. Co.*, 83 N. E. 542. This decision rests solely on the ground that, since execution for felony no longer works corruption of the blood, there is no public policy against the descent of the felon's property. In allowing recovery the court assumes that even after the execution of the insured the policy is a valid chose in action, which is the very point in issue. It leaves unanswered the argument of all prior decisions that the provision for insurance against death at the hands of justice, included in the broad terms of the contract, is void as against public policy.

Where the insured commits suicide and the policy contains no suicide clause, the courts are almost unanimous in allowing beneficiaries to recover.⁵

⁹ *Cutter v. Pollock*, 7 N. Dak. 631; *Mitter v. Brown*, 58 W. Va. 237.

¹⁰ *Farmers' Nat'l Bank v. Backus*, 74 Minn. 264. Cf. *Welch v. Renshaw*, 14 Colo. App. 526.

¹¹ Accord, *Farmers', etc., Co. v. Oregon, etc., Co.*, 31 Ore. 237. But cf. *Tome v. King*, 64 Md. 166.

¹² *Kelsey v. Sargent*, 2 N. Y. St. Rep. 669.

¹ *Amicable Ins. Co. v. Bolland*, 4 Bligh (N. S.) 194.

² 1 May, Ins., 4 ed., § 326; Bliss, *Life Ins.*, 2 ed., § 223.

³ *Burt v. Ins. Co.*, 187 U. S. 362 (denying recovery even though the insured was innocent of the crime for which he was executed). See 14 HARV. L. REV. 624; 16 *ibid.* 453.

⁴ *Contra*, *Collins v. Metropolitan Life Ins. Co.*, 27 Pa. Super. Ct. 353.

⁵ *Fitch v. Life Ins. Co.*, 59 N. Y. 557; *Mills v. Rebstock*, 29 Minn. 380; *Morris v.*

But it has been held that the personal representatives of the insured cannot recover under such circumstances, partly on the ground that suicide is not a risk assumed by the insurer, but principally on the ground that the assumption of such a risk is against public policy.⁶ There seems to be no sound reason for the distinction.⁷ If it is against public policy for personal representatives to recover on a provision insuring against suicide which is included in the broad language of the contract, it is against public policy for such a provision to be included in any insurance contract, and the contract must be void to that extent. At least one case has taken this view and has denied recovery to a beneficiary.⁸ But as the great weight of authority is opposed to this case and to the reasoning in the cases denying recovery to the representatives of the insured, it must be taken as settled that where the insured has committed suicide there is no public policy against recovery on a silent policy.

The two lines of cases seem irreconcilable in principle. For, whereas in the former it is said to be against public policy to insure against death as the result of a crime; in the latter it is considered not against public policy to insure against suicide which, if not a crime, is clearly an act against the policy of the law. On principle the former view seems the sounder. The argument that an express stipulation to insure against death at the hands of justice is against public policy as tending to encourage crime is unanswerable. Nor should it make a difference that the stipulation is embodied in a wider contract of indemnity.⁹ Probably no court would hold valid an accident policy insuring a robber against injury while plying his trade. And certainly an insured cannot recover on a fire insurance policy where he intentionally burns the property insured, even though the policy is broad enough in its terms to cover all risks.⁹ These analogies, however, have been disregarded in the suicide cases, and the modern tendency of the law as there evidenced is not to limit recovery on silent policies, even though considerations of public policy in some cases would seem to forbid it.¹⁰ The case under discussion, however, seems to accord with that tendency, and it is not improbable that, on the analogy of the suicide cases, it may be followed in spite of prior contrary decisions.

EFFECT OF ADJUDICATION OF BANKRUPTCY ON THE TITLE TO THE PROPERTY OF THE BANKRUPT. — The Bankruptcy Act of 1898 provides that the title of the trustee shall vest as of the date of adjudication.¹ This fiction has caused a diversity of opinion as to the nature and location of the title after adjudication and before the appointment of a trustee. Title has been said to be *in custodia legis*. But it is significant that because of the opposition of the law to lapses in title, and the difficulty in conceiving the court as a title-taking body, courts have taken this view only when

Life Ins. Co., 183 Pa. St. 563; *Patterson v. Mutual Life Ins. Co.*, 100 Wis. 118; *Campbell v. Supreme Conclave*, 66 N. J. L. 274; *Seiler v. Life Ass'n*, 105 Ia. 87; *Lange v. Royal Highlanders*, 110 N. W. 1110 (Neb.).

⁶ *Ritter v. Mutual Life Ins. Co.*, 169 U. S. 139. See *Supreme Commandery v. Ainsworth*, 71 Ala. 436, 446.

⁷ *Campbell v. Supreme Conclave*, *supra*. See 11 HARV. L. REV. 547.

⁸ *Hopkins v. Life Assur. Co.*, 94 Fed. 729.

⁹ *Washington Union Ins. Co. v. Wilson*, 7 Wis. 169.

¹⁰ *McDonald v. Order of Triple Alliance*, 57 Mo. App. 87. But see *Hatch v. Ins. Co.*, 120 Mass. 550.

¹ § 70 a, Act of July 1, 1898; 30 Stat. at L. 544.

necessary in order to protect property during the interval either from the elements, the fraud of the bankrupt, foreclosure sales, or seizure by state officers.³ As the court's agent in such interference must maintain any action in the bankrupt's name,⁴ and as the bankrupt himself has been allowed after adjudication to redeem land sold for taxes⁵ and to prosecute an infringement of a copyright,⁶ it must be concluded that the court's interference was with possession, not with title. It would follow, then, that title remains in the bankrupt on adjudication. This title, however, is sometimes said to be subject to a constructive trust in favor of the creditors. Adjudication indicates that the bankrupt will on a future day be stripped of his assets. And from adjudication a duty is imposed on the bankrupt to surrender such property as he had on the day of his adjudication to the trustee on appointment. But this inchoate duty would never become absolute if for one of many possible reasons no trustee was appointed, and in such event the creditors would never have had any estate in the assets. In the interim the bankrupt has the insurable interest;⁷ and has the beneficial user and possession of the assets, except as the Bankruptcy Act expressly limits his right of transfer and allows the court to interfere with his possession in cases of fraud or neglect. These statutory provisions, designed to protect the creditors, should not, therefore, be interpreted as creating a strict equitable interest, particularly since the creditors may thereby suffer detriment.⁸ For example, in a late Louisiana case the bankrupt's property, covered by an insurance policy which would be avoided by a change of interest, burned between adjudication and appointment, and the court held that no change of interest had been effected by adjudication.⁹ *Gordon v. Mechanics', etc., Ins. Co.*, 45 So. 384. Raising a strict equitable interest has been held to constitute such a change,¹⁰ and placing the legal title *in custodia legis* undoubtedly would do so. But the fiction of relation was intended to protect the creditors. It is impossible that interest or title passes to the trustee before his appointment; on his appointment he can take title only to property then in fact in existence, though he takes such property as of the date of adjudication.

This general rule that title remains in the bankrupt subject to the court's interference with possession would logically make *bona fide* payments to the bankrupt and sales to *bona fide* purchasers in the interval incontestible by the trustee. But an express provision of the Act in support of the fiction of relation back protects only *bona fide* holders before adjudication.¹¹ In the absence of fraud by the bankrupt a contrary rule, by obviating the paralysis of the estate in the interval, might benefit the creditors and would not despoil innocent parties, who derive small comfort from the further resulting fiction that petition and adjudication are constructive notice of bankruptcy.¹²

³ *In re Carow*, 41 How. Pr. (N. Y.) 112; *White v. Schloerb*, 178 U. S. 542; *In re Engel*, 105 Fed. 893; *Taylor v. Robertson*, 21 Fed. 209. But cf. *Rand v. Sage*, 94 Minn. 344.

⁴ *Lansing v. Manton*, Fed. Cas. No. 8077; *Sutherland v. Davis*, 42 Ind. 26.

⁵ *Hampton v. Rouse*, 22 Wall. (U. S.) 263.

⁶ *Myers v. Callaghan*, 5 Fed. 726.

⁷ See *Fuller v. Jameson*, 98 N. Y. App. Div. 53, *aff'd* 184 N. Y. 605; *Fuller v. N. Y. Fire Ins. Co.*, 184 Mass. 12.

⁸ See *Rand v. Iowa Central R. R.*, 186 N. Y. 58. Cf. 20 HARV. L. REV. 411.

⁹ *Skinner v. Houghton*, 92 Md. 68; *Gibb v. Phila. Fire Ins. Co.*, 59 Minn. 267.

¹⁰ § 70 *e*.

¹¹ See *Mueller v. Nugent*, 184 U. S. 1; *State Bank of Chicago v. Cox*, 143 Fed. 91.

SPECIAL ASSESSMENTS FOR SPECIAL BENEFITS. — Local or special assessments are different in nature from ordinary taxes both in the purposes for which they are levied and in the principles by which they are apportioned. Nevertheless special assessments are properly within the taxing power inherent in sovereignty¹ and therefore, in the absence of express constitutional provisions, are subject to judicial limitation only in so far as such limitation results from the nature of the power itself.² The theory upon which special assessments are levied is that, because of the situation of property with reference to some contemplated expenditure of public funds, a portion of the community will be specially benefited by the enhancement of the value of that property, and that those who are to be so benefited should make special contributions to help defray such expenditure.³ Whether or not a municipality has the power to levy such assessments and the extent of such power if it exists depends not only on the authority which the legislature has actually undertaken to grant to the municipality, but also on the power of the legislature to give such authority. As to this latter limitation it has been generally held that, subject to express constitutional restriction, the legislature may authorize a municipality to levy special assessments for local improvements.⁴ But owing to the well-known principle that a delegation of the taxing power must be strictly construed, a general enactment conferring upon a municipality power to levy taxes does not include the power to levy special assessments.⁵ Furthermore the limitation on the general taxing power that it must be for a public purpose applies as well to the authorization of special assessments as to other taxes.⁶ On the other hand, such limitations as those requiring that "all taxes shall be assessed in exact proportion to the value of the property" or that "taxes shall be equal and uniform throughout the state" have usually been held to apply only to general taxation.⁷ Yet there is a limitation on the power to levy special assessments which is not applicable to taxes generally, but which exists even in the absence of express constitutional provisions — a limitation based solely on the nature of the tax. It has been repeatedly held that a special assessment can be justified only when the parties so assessed receive a special benefit over and above that enjoyed by the general public, and only to the extent of that benefit.⁸

The question of the validity of city ordinances providing for the levy and collection of special assessments for street sprinkling involves an application of the foregoing considerations. The few cases that have arisen on this point are in decided conflict. A recent Michigan case holds invalid a statute expressly authorizing cities to levy such assessments, on the ground that there is no substantial special benefit to the property of the parties assessed.⁹ *Stevens v. City of Port Huron*, 113 N. W. 291. The better view would seem to be that continued and regular street sprinkling does materially increase the enjoyment and hence the value of realty abutting

¹ *Raleigh v. Peace*, 110 N. C. 32.

² *People v. Brooklyn*, 4 N. Y. 419.

³ See *City of Denver v. Knowles*, 17 Colo. 204; *Boston v. B. & A. R. R. Co.*, 170 Mass. 95.

⁴ *In re Piper*, 32 Cal. 530.

⁵ *City Council of Augusta v. Murphey*, 79 Ga. 101.

⁶ *In re Market St.*, 49 Cal. 546. See 21 HARV. L. REV. 277.

⁷ *City of Denver v. Knowles*, *supra*. See 2 Cooley, Taxation, 3 ed., 1201.

⁸ *Hammett v. Philadelphia*, 65 Pa. St. 146.

⁹ Accord, *Chicago v. Blair*, 149 Ill. 310; *N. Y. Life Ins. Co. v. Preat*, 71 Fed. 815; *Kansas City v. O'Connor*, 82 Mo. App. 655.

on the sprinkled street, and that this is a special benefit for which special assessments may be lawfully levied, and on these grounds such assessments have been sustained in several states.¹⁰

LIABILITY OF PUBLIC AGENT FOR INJURY TO PROPERTY RIGHTS. — There is some confusion as to the extent to which a defendant entering into transactions in some special character may be held liable personally for claims arising out of such transactions. An interesting phase of this problem is seen in cases where damage is caused to third persons by a public agent acting under a statute enumerating a certain class of contracts on which he may sue and be sued, and an action not included in this enumeration is brought against the agent for a claim based upon a transaction arising within the course of his employment. Of such a kind is a recent case in which a bankrupt had made payments to certain township trustees intending to prefer the township and the assignee in bankruptcy sought to recover these payments, although such a suit was not one of those enumerated in the statute authorizing the trustees to be sued. *Painter v. Napoleon Township*,¹ 156 Fed. 289 (Dist. Ct., N. D. Oh.). The opinion of the court that he should recover such payments is correct, because the defendants were not entitled to priority under the National Bankruptcy Act, and a state statute cannot relieve from liability under a national act.² But the case suggests the more difficult question of the trustees' liability when the statute restricting it is not overridden by a national act — a situation that, in the case of a preference, can arise today only where the former statute is federal.

If a private agent of a creditor knowingly receives a preference from a bankrupt, the assignee can recover it from the agent.³ This is said to rest on the theory that where an agent receives money which the law prohibits him from taking, there is a sort of tortious misdealing with property to which the fact of the agency is no defense. It has been said, however, that a public agent is not liable for injuries to property rights,⁴ in that, while he is acting as a public agent, his identity as an ordinary person is merged in his special character, and where the latter is created by statute, liability is restricted to the kind of actions enumerated in the statute. The answer to this reasoning is that the term agent, trustee, or public agent is descriptive and not inherent. A public agent is still A, individual. It is a fiction to say that while he is the former he is not the latter. If the agent's negligent acts have caused loss to the plaintiff, or if he has received the plaintiff's property from another, knowing that his principal is being illegally favored and the plaintiff defrauded, he has injured the plaintiff, and should therefore make restitution.⁵ This principle is well brought out in a case where the plaintiff paid a sum of money to the defendants, parish-officers, under an illegal contract to indemnify the parish against certain claims. The defend-

¹⁰ *Sears v. Boston*, 173 Mass. 71; *State v. Reis*, 38 Minn. 371.

¹ A demurrer to the bill was sustained on other grounds.

² *In re Debs*, 158 U. S. 564, 579; U. S. Const., Art. VI.

³ *Larkin v. Hapgood*, 56 Vt. 597; *Perkins v. Smith*, 1 Wils. 328.

⁴ *Jacobs v. Hamilton County*, Fed. Cas. No. 7161; *Feeholders of Sussex v. Strader*, 18 N. J. L. 108. Cf. *Commissioners of Hamilton County v. Mighels*, 7 Oh. St. 109. *Contra*, *Mitchell v. Harmony*, 13 How. (U. S.) 115; *Head v. Porter*, 48 Fed. 481. And cf. *May v. Board of Commissioners*, 30 Fed. 250.

⁵ Cf. *Berghoff v. McDonald*, 87 Ind. 549. *Contra*, *Carey v. Bright*, 58 Pa. St. 70.

ants went out of office and paid the money over to their successors. The claims against the parish were void, and the court allowed a recovery, holding that the defendants could not shield themselves behind their official position.⁶ The cases of a private agent and of a public agent not expressly relieved from liability should be governed by the same principle as to their liability in their individual capacity.⁷ In the present case the statute might be interpreted as giving freedom from liability only in actions of contract not enumerated. It would still more clearly afford no protection from individual liability for tortious misdealing with the property of others.

THE ACT OF AN ADMINISTRATIVE OFFICER AS ORIGINAL CORPORATE ACTION. — "A corporation can do nothing but by attorney."¹ Such a declaration comes readily enough from lawyers who have the conception that a corporation is a metaphysical being created by law, with none of the attributes of personality except the power to hold property and to do business through agents. Under the pressure of modern analysis this fiction tends to yield to more rational ideas, and corporate action is perceived more truly as simple group action.² But even though the body of associates is itself looked upon as the corporation rather than as the guardian of a fictitious "legal being," the fact remains that all corporate action which is not performed directly by the representative members of the group must be done through the medium of agents to whom the associates have given authority to act. Thus, under either theory as to the nature of a corporation, administrative officers can exercise only a delegated authority. A new theory of corporateness must be devised to meet a recent decision of the New Jersey Court of Errors and Appeals in which it was held that the execution of an affidavit by the vice-president of a corporation was corporate action *per se* and not *per alium*. *American Soda Fountain Co. v. Stolsenbach*, 68 Atl. 1078.³

For many centuries before the time of Lord Coke it was the habit of scholars to draw analogies between social institutions and the human body. As the "body in Christ" and the "body politic" were pictured with many fanciful details, so too was that lesser institution, the corporation.⁴ At one time this analogy found a place in English law. It was said that a body without a head is incomplete and cannot act.⁵ If, therefore, the lands of a monastery which was temporarily without an abbot should be disseised by one who died before a new abbot was appointed, still the new abbot could enter on the heir of the disseisor, for the corporation was headless and there was no person who could make continual claim.⁶ It was even held that a bond between the Mayor of Newcastle and the Mayor and Commonalty of

⁶ *Townson v. Wilson*, 1 Camp. 396. The rule of *in pari delicto* was not enforced because the plaintiff was under duress at the time of the contract and payment.

⁷ *Cf. In re Johnson*, 15 Ch. Div. 548.

¹ See 3 Comyns's Digest, 405.

² See Freund, *The Legal Nature of Corporations*, 7 *et seq.*; 1 Kyd, *Law of Corporations*, 15, 16. *Cf. Liverpool Ins. Co. v. Massachusetts*, 10 Wall. (U. S.) 566.

³ *Bank of Toronto v. McDougall*, 15 U. C. C. P. 475.

⁴ See 1 Pollock and Maitland, *History of English Law*, 489 *et seq.*; Gierke, *Political Theories of the Middle Ages*, 22.

⁵ See Carr, *Corporations*, 154, n. 1.

⁶ See *Co. Lit.* 263 *b*.

Newcastle was void because one cannot be bound to himself.⁷ It is easily conceivable that this emphasis upon the headship of the corporate body might have resulted in the conception that the title to the common property was vested in him and that his action should be corporate action *per se*. Few things are better settled in our law than that this is not the nature of the corporate organism, yet it is only on such a theory that the present decision can find support.

When statutes provide that affidavits shall be made by one who has a certain interest, his agent, or attorney, there seems to be no overpowering necessity that such an affidavit, when made by an agent, shall bear internal evidence of the agent's authority.⁸ Nevertheless, it has been held that such an agent must in his affidavit allege his authority to act.⁹ In general, however, the courts have been satisfied by any words which indicate that the affiant acts as agent for the proper person.¹⁰ Since the implied authority of corporate administrative officers is usually broad enough to cover this situation,¹¹ it would seem that a mere statement of his official position should fulfil the requirement of the courts.¹² If, however, the affidavit of an agent must comply with certain specific requirements, it would seem that, unless our theory of corporations is to be remoulded along rather astonishing lines, the affidavit of the officer of a corporation must fulfil those conditions.¹³

RECENT CASES.

ADMIRALTY — TORTS — TEST OF JURISDICTION. — A steamer broke loose from her moorings and damaged a bridge. The bridge-owners filed a libel against the steamer in admiralty. *Held*, that the court has no jurisdiction of the subject-matter. *Cleveland, etc., R. R. Co. v. Cleveland S. S. Co.*, 208 U. S. 316.

This case shows the disinclination of the Supreme Court to disturb its old rule that admiralty jurisdiction of a tort is to be determined by the locality of the consummation of the act. *The Plymouth*, 3 Wall (U. S.) 20. The rule, however, has been broken into to the extent that injury by a ship to a structure erected in aid of navigation, though affixed to the land, is within that jurisdiction. *The Blackheath*, 195 U. S. 361. That case might be distinguished in that the injury was to a beacon, and beacons have from ancient times been subject to admiralty jurisdiction. *Crosse v Diggs*, 1 Sid. 158. But in view of the early tendency to put a liberal construction on the constitutional grant of this jurisdiction to the federal courts, and of the clearly sound policy of that tendency, the rule should be regarded as thus modified. See *The Vengeance*, 3 Dall. (U. S.) 297. The Admiralty Court Act, 1861, gives the English admiralty jurisdiction over "any claim for damage done by any ship." See *The Swift*, [1901] P. 168. The doctrine of continental Europe is equally broad. See

⁷ Y. B., 21 Edw. IV, f 15, f 68, cited in 1 Pollock & Maitland, History of Eng. Law, 492, n. 3.

⁸ See *Duffie v. Black*, 1 Pa. St. 388.

⁹ *Miller v. Chicago, etc., Ry. Co.*, 58 Wis. 310.

¹⁰ *Smith v. Victorin*, 54 Minn. 338; *Wetherwax v. Paine*, 2 Mich. 555.

¹¹ *Sumner v. Dalton*, 58 N. H. 295. But cf. *Mahone v. Manchester, etc., R. R. Co.*, 111 Mass. 72.

¹² *First Nat'l Bank v. Graham*, 22 S. W. 1101 (Tex., Ct. App.).

¹³ See *New Brunswick, etc., Co. v. Baldwin*, 14 N. J. L. 440; *Shaft v. Phoenix Life Ins. Co.*, 67 N. Y. 544.

BENEDICT, ADM. PRAC., 3 ed., 91 *et seq.* Since international uniformity is peculiarly desirable in admiralty matters, it is to be regretted that the court, with the wiser foreign rule before it, was bound by its old decisions.

ALIENS — PREFERENCE GIVEN TO LOCAL CREDITORS BY STATE COURTS. — A, a foreigner, brought a tort action against B, an insolvent foreigner in Wisconsin, at the same time garnisheeing B's account in the X bank. After A had obtained judgment against B, C, a citizen of Wisconsin, sued B, and intervened in the garnishment process. Judgment was given for C. A appealed to the United States Supreme Court. *Held*, that such discrimination by a state in favor of its citizens is a matter of state policy, and is not unconstitutional. *Disconto Gesellschaft v. Umbreit*, 208 U. S. 570.

Before the National Bankruptcy Act many states adopted a policy of discrimination against non-resident creditors in favor of their citizens. Thus, where a debtor made a voluntary assignment and owned property in another state, only citizens of that state could attach the property. *Bacon v. Horne*, 123 Pa. St. 452; *contra*, *Paine v. Lester*, 44 Conn. 196; see 7 HARV. L. REV. 281. Nor could the assignee pursue his claims to the detriment of resident creditors. *Hunt v. Columbian Ins. Co.*, 55 Me. 290. Since the constitutionality of this policy was upheld, *a fortiori* discrimination against a foreigner would not be unconstitutional. This case was decided in the state court on the ground that, since the court could refuse to entertain a tort action between two foreigners, it would refuse to allow a foreign creditor to withdraw funds from the state when the claims of intervening domestic creditors were unsatisfied. *Disconto Gesellschaft v. Umbreit*, 127 Wis. 651. But the right of an alien to sue an alien for a foreign tort is a common law right and not within the discretion of the court. 1 WHART., CONF. OF L., 5, 64. To limit this right seems a clear case of judicial legislation, but it is certainly not a discrimination within the Fourteenth Amendment.

ARBITRATION AND AWARD — REVOCATION OF SUBMISSION TO ARBITRATION BY DEATH OF A PARTY. — A building contract contained a condition that any dispute between the parties as to the price to be paid for extras should be submitted to arbitration. A dispute having arisen, the submission was made a rule of court. Before final award was made one of the parties died. *Held*, that the proceedings can be continued by the personal representatives of the deceased. *In the Matter of an Arbitration between Donovan and Burke*, 42 Ir. L. T. 68 (Ire., K. B. D., Feb. 3, 1908).

At common law a submission to arbitration was revocable at the will of either party at any time before the award was finally made. *Green v. Pole*, 6 Bing. 443. This was so even when the submission was made a rule of court. *Skew v. Coxon*, 10 B. & C. 483. The arbitrator being only an agent, it was held that his authority, and hence the submission, was revoked by the death of one of the parties, unless there was in the submission an express clause to the contrary. *Blundell v. Brettargh*, 17 Ves. 232. The principal case is therefore clearly opposed to the English common law under which it admittedly should have been decided. In England the matter is now largely covered by statutes which provide that after the appointment of an arbitrator, the death of either of the parties shall not operate as a revocation. See RUSSELL, ARBITRATION, 9 ed., 129, 131. Statutory provisions of this nature are common in the United States, but in the absence of statute the courts have followed the English common law doctrine that the submission is revoked by the death of either party. *Gregory v. Boston Safe Deposit, etc., Co.*, 36 Fed. 408.

BANKRUPTCY — DISCHARGE — OBTAINING MONEY BY FALSE STATEMENT IN WRITING. — The plaintiff obtained from the defendant a loan of money on the faith of a materially false statement in writing. § 14 b (3) of the Bankruptcy Act of 1898 as amended in 1903 provides that a bankrupt "obtaining property on credit . . . upon a materially false statement in writing" shall be denied a discharge. *Held*, that the plaintiff is not entitled to a discharge. *In re Pfaffinger*, 19 Am. B. Rep. 309 (C. C. A., Sixth Circ., Jan. 1908).

It is said that the words of a statute are to be taken in the sense in which they will be understood by that public in which they are to take effect. *United States v. Isham*, 17 Wall. (U. S.) 496. And as the phrase "obtaining property on credit" does not ordinarily import to the commercial public a borrowing of money on time, it is argued that procuring cash by false statements is not cause for denying discharge. COLLIER, *BANKRUPTCY*, 6 ed., 198. But the law recognizes property in cash. And statutes defining the offense of obtaining property by false pretenses do not distinguish property in cash from property in other forms. See *State v. Rowley*, 12 Conn. 101. Money, then, clearly comes within the terms of the Act. Also in other sections of the Act "property" has been held to include money. See *Pirie v. Chicago, etc., Co.*, 182 U. S. 438. As nothing in the Act shows that the intention of Congress was to favor bankrupts who operate in cash, the present case must be supported. See *In re Dresser & Co.*, 144 Fed. 318.

BANKRUPTCY — POWERS AND DUTIES OF TRUSTEE — RECOVERY OF FRAUDULENTLY TRANSFERRED PROPERTY. — A trustee in bankruptcy filed a bill in equity to have a fraudulent transfer from the bankrupt to the defendant set aside. The defendant pleaded in bar that the complainant, with full knowledge of the facts, had ratified the transfer by obtaining a judicial order requiring the bankrupt to turn over the balance of the amount received from the defendant for the transferred property and unaccounted for. *Held*, that the plea is a valid defense. *Thomas v. Sugerman*, 157 Fed. 669 (C. C. A., Second Circ.).

The court relies on the doctrine of equitable estoppel, as found in cases of conversion, where a plaintiff, having first brought an action *ex contractu*, is held to have elected to pass title, so that he cannot thereafter recover for the conversion. *Terry v. Munger*, 121 N. Y. 161. The analogy is specious rather than convincing. For the case does not seem to present an election by the trustee between inconsistent rights. On the contrary, he is but carrying out two statutory duties: the one, to collect property in the possession of the bankrupt; the other, to proceed against the bankrupt's fraudulent grantees. Indeed, if he neglects the former, he may be liable in damages. *In re Reinboth*, 157 Fed. 672; see 21 HARV. L. REV. 441. A trustee's authority under the Bankruptcy Act is closely restricted, and the sole provision for his passing title is under § 706, on a sale of bankrupt property. It scarcely seems within the spirit of the Act to argue that a trustee, by merely performing a duty, has ratified the bankrupt's fraudulent transfer and made a sale to the detriment of the creditors.

BANKRUPTCY — PREFERENCES — PAYMENT TO PUBLIC AGENT FOR HIS PRINCIPAL. — A bankrupt preferred a town, making the payment to the township trustees, an office created by statute, and given power to sue and be sued on certain contracts. The trustees knew of the bankruptcy. *Held*, that they are liable to the bankrupt's assignee. *Painter v. Napoleon Township*, 156 Fed. 289 (Dist. Ct., N. D. Oh.). See NOTES, p. 534.

BANKRUPTCY — RIGHTS AND DUTIES OF BANKRUPT — EFFECT OF ADJUDICATION ON TITLE TO BANKRUPT'S PROPERTY BEFORE APPOINTMENT OF TRUSTEE. — The plaintiff's property was insured by the defendant company. The policy contained a condition that the policy should become void if any change took place in interest, title, or possession. After the plaintiff had been adjudicated a bankrupt, but before the appointment of a trustee, the property was destroyed. *Held*, that the policy has not become void. *Gordon v. Mechanics', etc., Ins. Co.*, 45 So. 384 (La.). See NOTES, p. 531.

BILLS AND NOTES — FICTITIOUS PAYEE — EFFECT OF DRAWER'S INTENTION. — The plaintiff, on the fraudulent representation of A, and to pay for shares of stock alleged to be for sale by B, drew a check payable to the order of B, who was ignorant of the transaction and had no such stock. A then indorsed the check, using the payee's name, to the defendant bank, a *bona fide*

purchaser for value. The defendant collected the amount from the plaintiff's bank, which amount the plaintiff seeks to recover. *Held*, that the defendant is not entitled to the proceeds of the check. *North and South Wales Bank v. Macbeth*, 24 T. L. R. 397 (Eng., H. of L., March 5, 1908).

For a discussion of this case in the Court of Appeal, see 21 HARV. L. REV. 214.

CARRIERS — CONNECTING LINES — LIABILITY OF INITIAL CARRIER FOR INJURIES OCCURRING ON CONNECTING LINES. — The defendant accepted the plaintiff's goods for transportation beyond its own line, receiving full payment and issuing a through bill of lading. The goods were injured while in the possession of a connecting carrier. *Held*, that the defendant is liable. *St. Louis, I. M. & S. Ry. Co. v. Randle*, 107 S. W. 669 (Ark.).

A carrier's liability for injuries not occurring on its own line arises only by contract express or implied. Whether such a contract is to be implied from the circumstances of a particular shipment is properly a question for the jury. *Gray v. Jackson*, 51 N. H. 9. The present case, however, follows the English rule that, as a matter of law, mere acceptance of the goods for carriage beyond the carrier's line constitutes an implied contract of through carriage. In this country the greater distances and dangers, making the hardship to the carrier seem larger, apparently prevented its adoption generally; and, since the acceptance is obligatory, this rule is certainly too strict. *Cf. Nutting v. Conn. R. R.*, 1 Gray (Mass.) 502; *Van Santvoord v. St. John*, 6 Hill (N. Y.) 157. Nevertheless the shipper's difficulties, first in placing responsibility for a loss and then in suing in a distant state, demand that a through contract should be readily implied, especially as the carrier may to some extent limit his liability by express contract. Therefore the result in the present case, where a through rate was made and a through bill of lading issued, each in itself strong evidence of a through contract, seems correct. *R. R. Co. v. Pratt*, 22 Wall. (U. S.) 123.

CONFLICT OF LAWS — OBLIGATIONS EX DELICTO — RECOVERY FOR CARRIER'S FAILURE TO DELIVER. — The plaintiff delivered goods to the defendant carrier in Kansas for transportation to Massachusetts. The goods were destroyed in Kansas under circumstances rendering the carrier liable. The plaintiff sued in Missouri *ex delicto* for failure to deliver, and by the law of the forum, if an action was barred by the statute of limitations in the state where it arose, no action would lie. *Held*, that the right of action arose in Massachusetts and that the Kansas statute of limitations is inapplicable. *Merritt Creamery Co. v. Atchison, T. & S. F. Ry. Co.*, 107 S. W. 462 (Mo., K. C. Ct. App.).

It is generally recognized that a common carrier through whose fault goods are destroyed is subject to an action either *ex contractu* or *ex delicto*. *Denman v. Chicago, etc., Co.*, 52 Neb. 140. If the suit is *ex contractu*, the validity of the contract and the extent of the carrier's obligation should be governed by the *lex loci contractus*. See 10 HARV. L. REV. 168. But if the contract is broken, the right to damages is a cause of action arising at the place of performance, since it is there that the promisor breaks his contract. See 17 HARV. L. REV. 354. When sued in tort, however, the obligation of the carrier as well as its breach is governed by the law of the place where the acts complained of occurred. *Indiana, etc., Co. v. Masterson*, 16 Ind. App. 323. Had the plaintiff sued in contract for the breach, his cause of action would certainly have arisen in Massachusetts. *Curtis v. Delaware, etc., Co.*, 74 N. Y. 116. But the defendant is under a duty, apart from contract, to deliver. *Raphael v. Pickford*, 5 M. & G. 551. The cause of action founded on a breach of this duty also arose in Massachusetts, and the present case is sound in so holding.

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — CONSTITUTIONALITY OF STATUTE AUTHORIZING SERVICE BY PUBLICATION ON CORPORATIONS. — A domestic corporation was served by publication according to Virginia Code, 1904, § 3225, which provides for publication of process once a week for four successive weeks in a newspaper, published in the state, in case no person who can be served for the corporation is in the county where suit is brought.

Held, that such service does not violate the federal Constitution. *Ward Lumber Co. v. Henderson-White Mfg. Co.*, 59 S. E. 476 (Va.).

For a discussion of the principles involved, see 21 HARV. L. REV. 453.

CONSTITUTIONAL LAW — LOCAL SELF-GOVERNMENT — STATE COMMISSIONER FOR THE ENFORCEMENT OF LIQUOR LAWS. — A statute authorized the appointment of a commissioner who should have power to exercise all the powers of the prosecuting attorneys in their respective counties in the enforcement of the state liquor laws. *Held*, that the functions essentially connected with officers named by the constitution can only be discharged by constitutional officers, and therefore this statute is unconstitutional. *Ex parte Corliss*, 114 N. W. 962 (N. Dak.).

For a discussion of the principles involved, see 15 HARV. L. REV. 848; 13 *ibid.* 441.

CONSTITUTIONAL LAW — POWER OF THE JUDICIARY — FEDERAL COURT ENJOINING STATE ATTORNEY-GENERAL FROM ENFORCING A STATE STATUTE. — The legislature of Minnesota fixed rates for the railroads of the state, and prescribed heavy penalties for each deviation therefrom. The federal circuit court enjoined the state attorney-general from proceeding under these statutes pending the decision of their constitutionality. He disobeyed the injunction, and the circuit court committed him for contempt. Alleging that, because of the Eleventh Amendment, the court was without jurisdiction, he instituted *habeas corpus* proceedings in the Supreme Court. *Held*, that, irrespective of the sufficiency of the rates, the statutes are unconstitutional, and the court has jurisdiction to enjoin the attorney-general from enforcing them. *Ex parte Young*, U. S. Sup. Ct., March 23, 1908. See NOTES, p. 527.

CONTRACTS — CONSTRUCTION — EXCEPTION OF HOLIDAYS FROM TIME ALLOWED BY CHARTER-PARTY FOR LOADING VESSEL. — By the terms of a charter-party the plaintiffs were to load the defendant's vessel "in seven weather working days (Sundays and holidays excepted)." For every day saved the plaintiffs were to be paid despatch money; for every day in excess they were to pay demurrage. They loaded the vessel in seven days, the work being continued through two holidays, and sued for despatch money for the two days saved. *Held*, that the plaintiffs can recover. *Nelson & Sons, Ltd., v. Nelson Line, Liverpool, Ltd.*, 24 T. L. R. 315 (Eng., H. of L., Feb. 6, 1908).

This decision reverses that of the lower court, criticized in 21 HARV. L. REV. 217.

CORPORATIONS — ACQUISITION OF MEMBERSHIP — ASSESSMENTS FOR PRELIMINARY EXPENSES. — The plaintiff, receiver for a corporation, sued the defendant on an assessment. *Held*, that so far as the assessment is to pay expenses of organization the defendant is liable, even if the entire capital has not been subscribed. *Myers v. Sturges*, 123 N. Y. App. Div. 470.

It is undoubted law that in the absence of special provisions a corporation cannot recover the full amount on subscriptions to its stock unless the entire capital has been subscribed. *Peoria and Rock Island Ry. v. Preston*, 35 Ia. 115. In establishing a different rule for assessments to cover the preliminary expenses, the court relied on an earlier case which reached the same result, but in that case special provisions in the charter of the corporation were particularly noticed and seem sufficient to distinguish it from the present case. *Salem Mill Dam Corp. v. Ropes*, 6 Pick. (Mass.) 23; see also *Anvil Mining Co. v. Sherman*, 74 Wis. 226. In principle, the reasons upon which the general rule is based seem equally pertinent here. If a subscriber does not contract to pay the full price until all the stock is taken, it appears unwarranted to assume that he agrees to become liable for the preliminary expenses at an earlier time. The question turns solely on the proper construction of his promise, and he no more contemplates becoming liable for one kind of expenditure than for another.

CORPORATIONS — NATURE OF THE CORPORATION — CORPORATE ACTION PER SE THROUGH THE MEDIUM OF ADMINISTRATIVE OFFICER. — A statute provided that chattel mortgages should have annexed an affidavit of consideration made by the holder of the mortgage, his agent, or attorney. The affidavit annexed to a mortgage taken by a corporation recited that the affiant was vice-president of the corporate mortgagee. *Held*, that the affidavit need not contain a recital that the affiant is an agent, because the act of the administrative officer was the act of the corporate mortgagee *per se*. *American Soda Fountain Co. v. Stolzenbach*, 68 Atl. 1078 (N. J., Ct. Er. and App.). See NOTES, p. 535.

DAMAGES — CONSEQUENTIAL DAMAGES — MENTAL ANGUISH RESULTING FROM EXCLUSION FROM DANCE HALL. — The plaintiff, attired in the uniform of a non-commissioned officer in the navy, was refused admission to the defendant's dance hall on a ticket bought by him while in civilian dress. *Held*, that the plaintiff may recover only the price of the ticket. *Buenale v. Newport Amusement Ass'n*, 68 Atl. 721 (R. I.).

A theatre ticket is a revocable license; but if it is wrongfully revoked an action for breach of contract is maintainable. *Burton v. Scherpf*, 1 Allen (Mass.) 133. The ordinary rule limits recovery for breach of contract to those damages within the contemplation of the parties on entering the agreement. *Hadley v. Baxendale*, 9 Exch. 341; see 12 HARV. L. REV. 423. Although pecuniary loss only is contemplated as the result of a breach of most contracts, nevertheless, where it is clear that a breach of contract will result in mental anguish, such anguish is made the basis of further damages. For example, in an action for breach of contract to carry, damages were allowed for humiliation attending ejection from an excursion steamer. *Coppin v. Braithwaite*, 8 Jur. 875. Similarly, damages have been recovered for mental anguish resulting from breach of contract to furnish a trousseau on the agreed day, and to preserve the remains of a plaintiff's child until interment. *Lewis v. Holmes*, 109 La. 1030; *Renih:m v. Wright*, 125 Ind. 536. Since humiliation might reasonably have been contemplated as a consequence of refusal to perform the present contract, in the absence of fraud on the plaintiff's part, the court's limitation on the verdict seems insupportable. See 1 HARV. L. REV. 17, 21.

EXTRADITION — INTERSTATE EXTRADITION UNDER U. S. CONSTITUTION — WHAT CONSTITUTES A FUGITIVE FROM JUSTICE. — The plaintiff, while in Rhode Island, was indicted for a crime committed in New York. Upon demand Rhode Island delivered him up to the New York authorities. When he was arraigned, the district attorney moved to dismiss the indictment for failure of evidence. The motion was granted, and the plaintiff returned to Rhode Island without objection from the authorities. He was again indicted in New York for this crime, and upon demand the Governor of Rhode Island had him arrested for extradition. He sued out a writ of *habeas corpus*. *Held*, that the plaintiff's discharge from custody be refused. *Bassing v. Cady*, 208 U. S. 386.

This is the first time this point has arisen. The Supreme Court refused to limit further the class of persons falling within the interstate extradition provisions in the United States Constitution and statutes. See 12 HARV. L. REV. 532; 21 *ibid.* 224.

ILLEGAL CONTRACTS — CONTRACTS COLLATERALLY RELATED TO SOMETHING ILLEGAL — CONTRACT OBTAINED BY BRIBERY OF AN AGENT. — A statute made it a crime to give an agent a bonus to influence his conduct in his employment. The plaintiff gave such a bonus to the defendant's agent, inducing the agent to give him a contract for the sale of goods to the defendant. Having fully performed, the plaintiff brought suit for the purchase price. *Held*, that he cannot recover. *Sirkin v. Fourteenth Street Store*, 38 N. Y. L. J. 2193 (N. Y. App. Div., Feb., 1908).

The agreement between the agent and the plaintiff would be illegal even in the absence of a statute. *Holcomb v. Weaver*, 136 Mass. 265. But the contract sued on is an independent contract with a different party. Though the means of procuring it are criminal, neither the consideration nor the purpose of the new

contract is illegal. The corrupt agreement with the agent would seem to be merely collateral to the main contract, and not so closely connected with it as to render it illegal. *City of Findlay v. Perts*, 66 Fed. 427. The better view would hold the contract valid but voidable at the option of the defendant, as in cases of fraud. The defendant may then rescind the contract, return the goods and sue in tort for any damages he has suffered. *Young v. Hughes*, 32 N. J. Eq. 372. Or he may affirm the contract and claim the bonus, from the agent if it has been paid over to him; if not, from the plaintiff. *Grant v. The Gold, etc., Syndicate*, [1900] 1 Q. B. 233. To allow the defendant to keep the goods and to pay nothing for them seems erroneous.

INJUNCTIONS — NATURE AND SCOPE OF REMEDY — STREET RAILWAY ENJOINED FROM DECREASING ITS SERVICE. — The defendant railway threatened to decrease the number of cars on one of its lines from one every ten minutes to one every twenty minutes. The attorney-general applied for a decree enjoining it from running a smaller number of cars than at present. The lower court granted a permanent injunction. *Held*, that the injunction is proper. *Territory of Hawaii v. Honolulu Rapid Transit & Land Co.*, Sup. Ct. of Hawaii, Jan. 20, 1908.

It may be taken as an elementary principle that equity should not intervene except in the absence of an adequate remedy at law. It would seem that the court should be especially careful in a case like this because of the hesitation which is usually felt over granting a mandatory injunction. See 12 HARV. L. REV. 95. Further, it is submitted that there is an adequate remedy by *mandamus*. The facts in this case appeared to the court to show clearly that it was the statutory duty of the railroad to maintain the more frequent service. It is no objection that the statute does not order a specific number of cars, so long as the duty is clear and the railway fails to perform it. *Mandamus* has been frequently granted in analogous cases. *Indiana v. L. E. & W. Ry.*, 83 Fed. 284; *People v. Troy & Boston Ry.*, 37 How. Pr. (N. Y.) 427. Since the duty is owed to the public, suit may properly be brought by the attorney-general in their behalf. *Florida v. Johnson*, 30 Fla. 433. It would seem, therefore, that this is not a proper case for an injunction, negative in form but mandatory in substance.

INSURANCE — DEFENSES OF INSURER — EXECUTION OF INSURED FOR CRIME. — A insured his life with the defendant company under a policy which contained no provision against death at the hands of justice. He committed a murder, and was convicted and executed therefor. His executor sought to recover on the policy. *Held*, that he can recover. *Collins v. Metropolitan Life Ins. Co.*, 83 N. E. 542 (Ill.). See NOTES, p. 530.

INTERSTATE COMMERCE — ELKINS ACT — RECEIVING ILLEGAL CONCESSIONS FROM PUBLISHED RATES A CONTINUING CRIME. — The defendant carrier's contract with the defendant shipper called for transportation at rates which necessitated concessions, owing to a subsequent change in the published rates. The concessions were obtained and the goods delivered to the carrier in Kansas. The prosecution was instituted in a district of Missouri through which the goods were transported. *Held*, that the concessions so granted were a violation of the Elkins Act, and that the court has jurisdiction, since receiving such concessions is a continuing act. *Armour Packing Co. v. United States*, 209 U. S. 56.

For a discussion of this case in the lower court, see 21 HARV. L. REV. 135.

LIMITATION OF ACTIONS — ACCRUAL OF ACTION — ACTION BY OWNER OF FUTURE INTEREST IN PERSONALTY. — The defendant bank assisted the owner of a life interest in several of its shares to sell the shares outright. *Held*, that the statute of limitations began to run against the owner of the future interest from the date of the sale. *Yeager v. Bank of Kentucky*, 106 S. W. 806 (Ky.).

A mere trespasser on land cannot be sued by the remainderman and conse-

quently cannot acquire a prescriptive title to the remainder. *Jeffries v. Butler*, 108 Ky. 531. But against any one causing actual damage to an expectant estate an action lies, and it suit is not brought within the statutory period, a prescriptive right may be acquired. See *Metropolitan Ass'n v. Petch*, 5 C. B. (N. S.) 504; *Heilborn v. Water Ditch Co.*, 75 Cal. 117. If the property is personalty, the statutory period does not begin to run against a future interest in favor of a stranger in possession until the termination of the life interest, since until that time the owner of the future interest has no cause of action. *Clarkson v. Booth*, 17 Grat. (Va.) 490. In the present case, the action not being against an adverse possessor but against one who aided in the conversion of the entire property, the period of limitation is properly computed from the date of the act. It is impossible to select as the starting-point the termination of the life interest, because the conversion is an immediate wrong to the owner of the future interest. If the defendant is to be liable at all, the right of action must accrue at the time of the sale.

LIMITATION OF ACTIONS — NATURE AND CONSTRUCTION OF STATUTE — APPLICATION TO REVERSIONER OF STATUTE BARRING ACTION FOR PROPERTY SOLD BY ADMINISTRATOR. — The defendant went into possession of land under a conveyance of the dower interest of the deceased's widow. Later he bought in the reversion at a void administrator's sale. A statute provided that all actions for the recovery of property bought at an administrator's sale should be barred one year after the sale. *Held*, that the reversioner is barred one year after the death of the widow. *Jordan v. Bobbitt*, 45 So. 311 (Miss.).

Ordinarily a statute of limitations begins to run not from the time the acts complained of occurred, but from the time a cause of action became vested; for the wording of the statute usually necessitates such construction. *Andrews v. Hartford, etc., Co.*, 34 Conn. 57. In the present case the statute, by express provisions, is to run from the date of sale, and such statutes are usually strictly construed. *Jones v. Billstein*, 28 Wis. 221. But, as the court admits, it would be unreasonable to bar the plaintiff before his cause of action arose, and indeed such a construction would render the statute unconstitutional. See *Price v. Hopkin*, 13 Mich. 318. It would seem that inasmuch as the statute runs from the date of the sale, it was enacted to cut off within one year all causes of action then existing. But, since it cannot cut off the plaintiff's right at that time, it is a strained construction to make it run against him from the death of the life tenant. It would therefore seem that the general statute of limitations should apply. *Kessinger v. Wilson*, 53 Ark. 400.

MUNICIPAL CORPORATIONS — LIABILITY FOR TORTS — PERMITTING FIREWORKS IN STREET. — The defendant city issued a permit to a political club to give an exhibition of fireworks in the streets. At such an exhibition on a wide street, a mortar used for throwing bombs accidentally exploded, injuring the plaintiff, a voluntary spectator. *Held*, that the verdict and judgment for the defendant are affirmed, since the facts do not show a nuisance as a matter of law. *Melker v. City of New York*, 190 N. Y. 481.

This case confines an earlier New York decision, which held that the discharge of fireworks in the streets of a large city constituted a nuisance as a matter of law, to its particular facts. See *Speir v. City of Brooklyn*, 139 N. Y. 6. The present case is clearly right in holding that whether a given act is a nuisance depends upon all the circumstances under which the act is committed. The court, however, assumes, and it seems to be law in New York, that if this exhibition was a nuisance the defendant would necessarily be liable to any one who was hurt by it. *Landau v. City of New York*, 180 N. Y. 48. The only ground upon which the defendant can be held liable in this case is that it neglected its duty to use due care to keep its streets reasonably free from obstructions and nuisances. But in order to recover for negligence, the plaintiff must show that there was a duty owing to him. *O'Donnell v. Providence & Worcester Ry.*, 6 R. I. 211. It is at least doubtful if a city owes such a duty to persons who are present merely as spectators of the alleged nuisance and not

as users of the highway in the ordinary manner. *Richards v. Inhabitants of Enfield*, 13 Gray (Mass.) 344.

NUISANCE — WHAT CONSTITUTES A NUISANCE — OBSTRUCTION OF QUASI-PUBLIC DOCK. — A dock owned by a corporation, but by statute open to all persons on payment of the dock rates, was negligently damaged by the defendant so that it had to be closed for repairs. The plaintiff sought to recover for delay resulting from his being unable to dock his ship and to load his cargo. *Held*, that the plaintiff cannot recover. *Anglo-Algerian S. S. Co. v. Houlder Line*, [1908] 1 K. B. 659.

It is settled that an individual can recover for the direct, particular damages he suffers from unlawful obstruction of a highway. *Rose v. Miles*, 4 M. & S. 101. Though there is some conflict as to how direct the damages must be to give ground for an action, if obstructing the dock were considered equivalent to obstructing a highway, the damage was probably sufficiently direct to warrant a recovery in the present case. *Brick Mfg. Co. v. D. L. & W. R.*, 51 N. J. L. 56; *cf. Willard v. Cambridge*, 3 Allen (Mass.) 574; see 19 HARV. L. REV. 540. The plaintiff's statutory right to use the dock on payment of the dock rates might seem as worthy of protection as his right to use a highway. The court seems warranted, however, in not applying the principles applicable to cases of public nuisance, since the courts tend to restrict the limits of liability in such cases. *Willard v. Cambridge*, *supra*. Moreover the position of the dock company closely resembles that of a common carrier, and it has been held that a brakeman injured by a bridge so negligently built that it obstructed a railroad's right of way cannot recover from the construction company. *Stoneback v. Thomas Iron Co.*, 4 Atl. 721 (Pa.).

PATENTS — INFRINGEMENT — EXPIRATION OF PATENT AS AFFECTING REMEDY IN EQUITY. — A bill was filed thirteen days before the expiration of a patent to restrain its infringement and secure an accounting. The defendant had two months in which to enter an appearance. *Held*, that the bill is dismissed, since an injunction is not the real object of the suit. *Diamond Stone-Sawing Machine Co. of N. Y. v. Seus*, 38 N. Y. L. J. 2469 (Circ. Ct., S. D. N. Y., Mar. 1908).

A prayer for an injunction is ordinarily essential in order that equity may entertain a bill for the infringement of a patent. *Root v. Railway Co.*, 105 U. S. 189. And an injunction is not granted after the patentee's license has expired. *Campbell v. Ward*, 12 Fed. 150; but *cf. N. Y., etc., Co. v. Magowan*, 27 Fed. 111. But a bill will not be dismissed because the patent expired between the beginning and the termination of the suit, for equity retains jurisdiction to complete the patentee's remedy in one proceeding. *Beedle v. Bennett*, 122 U. S. 71. The prayer for an injunction cannot, however, be used as a pretext to secure such an equitable settlement when the legal remedy is adequate. *McDonald v. Miller*, 84 Fed. 344. Nor will equity assume jurisdiction when the patent runs out so soon that an injunction, although honestly desired, cannot be granted before the patent expires. *Bragg Mfg. Co. v. Hartford*, 56 Fed. 292. If the patentee delays until the expiration of his right is at hand, his good faith becomes questionable, and, although an injunction can be had before the patent expires, assumption of jurisdiction is in the discretion of the court.

POLICE POWER — REGULATION OF BUSINESS AND OCCUPATIONS — TEN-HOUR LAW FOR WOMEN IN FACTORIES. — An Oregon statute provided that no female should be employed in any mechanical establishment, or factory, or laundry more than ten hours during any one day. *Held*, that the statute is constitutional. *Muller v. Oregon*, 208 U. S. 412.

For a discussion of the principles involved, see 20 HARV. L. REV. 653. See also *supra*, p. 495 *et seq.*

QUASI-CONTRACTS — RIGHT AND OBLIGATIONS OF PARTIES IN DEFAULT UNDER CONTRACT — RECOVERY BY PLAINTIFF IN DEFAULT FOR SERVICES RENDERED. — The plaintiff abandoned a contract of service which was unen-

forceable under the statute of frauds, and sued on a *quantum meruit* for the value of services rendered. *Held*, that the plaintiff cannot recover. *Collins v. Smith*, 44 Can. L. J. 163 (Ont., Div. Ct., Feb. 3, 1908).

It is generally held that one who abandons a contract cannot recover for a part performance of it. *Hapgood v. Shaw*, 105 Mass. 276. But, by the weight of authority, a plaintiff in default may recover for services rendered under an oral contract unenforceable by reason of the statute of frauds. *Bentley v. Smith*, 59 S. E. 720 (Ga.); *contra*, *Swansee v. Moore*, 22 Ill. 63. The reason usually given is that the defendant should not be allowed to set up the void contract as a defense. *King v. Welcome*, 5 Gray (Mass.) 41. This position, however, seems inconsistent with the plaintiff's privilege of setting up the contract to raise an implied promise for his *quantum meruit*, and with the effect given to the contract in fixing his damages. If recovery is allowed, it would seem better to put it on the ground that the defendant would be unjustly enriched by being allowed to retain the benefit of the plaintiff's services without paying for them. Accordingly any damages caused by the plaintiff's failure to fully perform should be deducted from the amount allowed for his services. *Fuller v. Rice*, 52 Mich. 435.

RECEIVERS — LIABILITY FOR RECEIVERSHIP EXPENSES. — The plaintiff brought suit for the foreclosure and sale of the property of a quasi-public corporation. Upon the plaintiff's application a receiver was appointed pending final judgment in the suit. After a decree establishing the plaintiff's rights it was found that the assets of the corporation were insufficient to pay the expenses of the receivership. *Held*, that the plaintiff is not personally liable for the deficiency. *Atlantic Trust Co. v. Chapman*, 208 U. S. 360. See NOTES, p. 529.

SOVEREIGNS — ACTION BY TRUSTEE PROCESS AGAINST RAILWAY OWNED BY FOREIGN SOVEREIGN. — The plaintiff brought suit for a tort by trustee process in Massachusetts against an unincorporated railway in Canada owned by the Crown. *Held*, that the court has no jurisdiction. *Mason v. Intercolonial Ry. of Canada*, 83 N. E. 876 (Mass.).

The court considered the case as if it were a suit against a foreign sovereign. A similar case was discussed in 17 HARV. L. REV. 270, 348.

STATUTES — INTERPRETATION — EFFECT OF SPECIAL SAVING CLAUSE ON GENERAL SAVING STATUTE. — The defendant was convicted of paying rebates in violation of the first section of the Elkins Act which had been superseded by the Hepburn Act. The offenses were committed prior to the enactment of the latter. The Hepburn Act expressly repeals all statutes or parts of statutes in conflict with its provisions. It contains an express saving clause mentioning only pending causes, and providing that such causes "shall be prosecuted to conclusion in the manner heretofore provided by law." § 13 of the United States Revised Statutes provides that "the repeal of any statute shall not have the effect to release any penalty incurred under such statute unless the repealing act shall so expressly provide." *Held*, that the conviction is valid. *Great Northern Ry. Co. v. United States*, 208 U. S. 452.

For a discussion of a previous decision reaching the same result, see 20 HARV. L. REV. 502.

SURETYSHIP — SURETY'S RIGHT OF SUBROGATION — SUBROGATION TO RIGHTS OF PRINCIPAL. — The B Company became surety on the statutory bond given by A, a contractor on government work, for the performance of the contract and the payment of laborers and materialmen. A completed the work, but B had to pay to laborers more than the amount due to the contractor and retained by the government under the contract. *Held*, that B is entitled to the fund retained by the government. *Henningsen v. U. S. Fidelity and Guaranty Co.*, 208 U. S. 404.

It is fundamental in the law of suretyship that a surety discharging the obligation of his principal is subrogated to the rights of the creditor against the principal. And the surety has also the right, equally well recognized but not

so frequently used, to be subrogated to all rights of the principal against any one else to be reimbursed for expenditures arising out of the transaction. *Bushong v. Taylor*, 82 Mo. 660; *Heart v. Bryan*, 2 Dev. Eq. (N. C.) 147. In the present case the situation is somewhat unusual in that one bond creates two entirely distinct suretyships. The surety is bound to the government for the completion of the work by the contractor and is bound to the laborers and materialmen for the payment of their claims by the contractor. *United States v. National Security Co.*, 92 Fed. 549. Consequently the surety, when it discharges the claim of the laborers, is entitled to be subrogated to the fund retained by the government, since, up to the amount of that fund, the burden should ultimately be borne by the government and not by the contractor. The surety is also entitled to exoneration from that fund. *Richards Brick Co. v. Rothwell*, 18 D. C. App. 516.

TAXATION — PARTICULAR FORMS OF TAXATION — SPECIAL ASSESSMENTS FOR SPRINKLING STREETS. — Under a statute authorizing cities to provide by ordinance for the sprinkling of streets and to levy and collect special assessments therefor, the defendant city ordered an assessment for such a purpose. The abutting owners brought a bill in equity to have the assessment set aside. *Held*, that the statute authorizing the assessment is invalid. *Stephens v. City of Port Huron*, 113 N. W. 291 (Mich.). See NOTES, p. 533.

TRUSTS — CESTUI'S INTEREST IN RES — RIGHT TO EXCESS OF INTEREST OBTAINED BY BREACH OF TRUST AS BETWEEN TENANT FOR LIFE AND REMAINDERMAN. — The trustee of a settlement, invested in three per cent consols, sold the consols and used the proceeds in an unauthorized investment which yielded five per cent interest. After a number of years the trustee replaced in consols the amount he had withdrawn. The plaintiff, the remainderman under the settlement, claimed that the excess of interest obtained by the breach of trust should be added to the capital. *Held*, that the plaintiff is not entitled to the excess of interest. *Slade v. Chaine*, [1908] 1 Ch. 522.

The case follows two English cases, apparently the only decisions on the point. *Stroud v. Gwyer*, 28 Beav. 130; see *In re Appleby*, [1903] 1 Ch. 565. An early English case, however, seems irreconcilable in principle, in holding that when a trustee, in breach of his duty, failed to convert funds into authorized securities, but left them in a loan bearing ten per cent interest, the life beneficiary was not entitled to the actual interest that the money yielded. *Dimes v. Scott*, 4 Russ. 195; see also *Hill v. Hill*, 45 L. T. Rep. 126. Aside from an approval of this latter decision, the precise point does not seem to have arisen in this country. See *In re Lasak's Estate*, 20 N. Y. Supp. 74. It seems settled that when trust funds are invested in bonds which depreciate in value, such deductions should be made from the income of the life beneficiary as will make the capital of the trust fund whole when the bonds mature. *New York, etc., Co. v. Baker*, 165 N. Y. 484. If, to keep the *corpus* undiminished, the life beneficiary is to suffer, it would seem fair that he should receive such windfalls as may arise from excess in interest so long, at least, as the remainderman is uninjured.

UNFAIR COMPETITION — CONSPIRACY — NECESSITY OF INTENT TO INJURE PLAINTIFF. — Certain elevator owners, under an agreement to regulate competition in the grain business, combined with certain railroads to discriminate against non-members of the combination. The plaintiff sued for damages from resulting discrimination. *Held*, that the parties to the combination may avoid liability for conspiracy by proving that they entered the agreement in the belief that the plaintiff would become a member. *Kellogg v. Sowerby*, 190 N. Y. 370.

The intent is a vital element in a conspiracy. **EDDY, COMBINATIONS, § 369.** But this simply means that a combination is not illegal unless its object or the intended means of attaining it are improper. *Cf. O'Callaghan v. Cronan*, 121 Mass. 114; *Talbot v. Cains*, 5 Met. (Mass.) 520. The present case, however, before imposing civil liability, requires proof that the confederacy was, from its

inception, intended to attack the specific party suing. The gist of civil recovery is damage, the conspiracy usually being important only to give additional rights against persons who, though inactive, nevertheless participated in the common design. *Hutchins v. Hutchins*, 7 Hill (N. Y.) 104; *Robertson v. Parks*, 76 Md. 118. So the plaintiff may fail to prove the conspiracy, yet recover against any defendants who actually caused the injury. *Doremus v. Hennessy*, 62 Ill. App. 391. On this principle the present plaintiff should have recovered at least from those who discriminated. But under the New York statute, this combination is a criminal conspiracy. N. Y. PENAL CODE, § 168, subd. 6; *People v. Sheldon*, 139 N. Y. 251. When an injury has been caused by the carrying out of criminal designs, it should be no excuse that the acts originated from another purpose. The principal case, therefore, seems wrong in giving heed to the specific intent where an illegal combination was the proximate cause of the injury.

WITNESSES — COMPETENCY — COMPETENCY OF WITNESS CONVICTED IN ANOTHER STATE TO TESTIFY. — A Missouri statute declared that persons convicted of certain specified crimes should be incompetent to be sworn as witnesses. In a criminal suit a witness convicted of such a crime in Indiana testified under objection. *Held*, that his testimony was properly admitted in Missouri. *State v. Landrum*, 106 S. W. 1111 (Mo., K. C. Ct. App.).

The civil law regarded infamy as a status governed by the law of the convict's domicile. 2 BOULLENOIS, obs. 32. This view, with its incident of incapacity to testify elsewhere, was not adopted by the common law. STORY, CONF. OF L., 8 ed., §§ 91, 92. Nor does the constitutional requirement that judgments of the several states be given full faith and credit give rise to an extraterritorial incapacity; it refers only to the conclusiveness of the fact for which a judgment stands. *Com. v. Green*, 17 Mass. 515. The question then is, does the local law of a state render one convicted in another state incompetent to testify? It has been held that it does, provided the other state's law corresponds with that of the former. *Chase v. Blodgett*, 10 N. H. 22. But the better of the scanty authority, either at common law or under statutes substantially declaratory, gives no effect at home to foreign convictions, whatever their effect there. *Sims v. Sims*, 75 N. Y. 466; *contra*, *State v. Candler*, 3 Hawks (N. C.) 393. This result is justified in view of the varying attitudes of different states toward the same crimes, and the possible untrustworthiness of one convicted of crime abroad is sufficiently guarded against by admitting the fact of conviction on the question of his credibility.

BOOKS AND PERIODICALS.

I. LEADING LEGAL ARTICLES.

GOVERNMENTAL POWERS OF THE PRESIDENT OVER NEWLY ACQUIRED TERRITORY. — By the treaty of Feb. 26, 1904, with the Republic of Panama the United States acquired in perpetuity the use of a strip of land ten miles wide, running across the isthmus, which is commonly known as the Canal Zone. The Fifty-eighth Congress, then in session, voted by a resolution of April 28, 1904, that until the expiration of that session, or unless provision for a temporary government should be sooner made, all powers of government should be vested in the President, or in such persons as he should appoint. The Sixtieth Congress is now in session. On March 19th Representative Harrison of New York said that since the expiration of the Fifty-eighth Congress no further provision had been made for the government of the Canal Zone; that since that time the President had had authority to act only as the executive of a *de facto* govern-

ment, but that he had been acting in a legislative capacity, making among other laws those establishing trial by jury, regulating marriage, and defining crimes.¹ While not criticizing adversely any specific law, Mr. Harrison declared that such legislative action by the President was unconstitutional; that in the acquisition of all other territory former Presidents had acted in a legislative capacity only by virtue of their being at the head of a temporary military government; that in the Canal Zone there was no military government and no necessity for one. Accordingly Mr. Harrison presented a resolution, which was adopted, asking the President to show by what authority he had acted.

The power of the United States to acquire new territory, and to govern such territory otherwise than as a state, is undisputed.² It has been a fundamental theory of English law that the temporary power of government of newly acquired territory is in the executive until this power is assumed by Parliament or relinquished to the inhabitants of the territory.³ Such seems to be the law in this country, subject to constitutional limitations which are binding on Congress as well as on the President; for there must be some government over such territory, and until Congress assumes control this implied power must necessarily rest in the executive as such. Thus, though the governments instituted under executive authority by General Kearney in New Mexico, and Admiral Stockton in California, were called military governments by Mr. Harrison, they were not so in fact.⁴ For example, in California, on the conclusion of the treaty with Mexico, the President abolished the military duties and established the usual customs duties, and the validity of such legislation up to the time that Congress took charge of the customs was upheld by the Supreme Court.⁵ It seems fair, therefore, to conclude in the present case that if Congress had not, by the Act of April 28, 1904, given the President power to govern the Canal Zone for a year, he would have been justified in his exercise of governmental functions.

The question remains as to the effect of that Act. It has been contended that the Act was merely declaratory of the already existing powers of the President; that this is an example of the abundant caution of Congress, which often confirms acts which need no confirmation, and declares to exist rights already existing. Under such construction this Act would be simply nugatory. A second view is that the Act merely authorized the President to delegate his powers to a commission so that at the end of the Fifty-eighth Congress he could no longer make any such delegation, but retained all governmental power in himself. In this light, too, the Act would have no effect upon the President's power to govern without a commission. A third construction already suggested is that Congress assumed the power and delegated it to the President for a specific period only. If thereby Congress is considered to have assumed control of territory for a year, after that year and until Congress resumes control, the President can exercise the governmental power, for the same reasons of policy as in the former case where Congress has not yet taken control of newly acquired territory. But if this construction should be said to mean that Congress permanently took control and decided for a year to exercise its control through the President, and after that time made no provision by which he could act for it and did not act itself, then a new question is raised. Simply for the supremacy of the United States it might not be as necessary in this case as in the case of newly conquered territory that the President have control while Congress is not in fact acting; for an interval between legislative acts, unlike an interval before the legislature has acted, must always be of a kind which the legislature could foresee and provide for. But the United States owes at least a moral duty both to its own citizens and to the citizens of foreign nations who are in the Canal Zone, to see that they are protected in their personal rights according

¹ Executive Order, Mar. 13, 1907; May 31, 1907; Feb. 6, 1908.

² *American Ins. Co. v. Canter*, 1 Pet. (U. S.) 511.

³ *Campbell v. Hall*, Cowp. 204.

⁴ See *Leitendorfer v. Webb*, 20 How. (U. S.) 176.

⁵ *Cross v. Harrison*, 16 How. (U. S.) 164.

to some principles of justice. For their protection a permanent control by Congress with a cessation of all actual regulation is a mere form without substance, so that from the point of view of the governed expediency requires that the President have governmental power in the interval between congressional regulations.

VOID, ILLEGAL, OR UNENFORCEABLE CONSIDERATION. — In a recent article Mr. William P. Rogers discusses the various phases of contracts in which a part of the consideration furnished by one party is void and part valid. *Void, Illegal, or Unenforceable Consideration*, 17 Yale L. J. 338 (March, 1908). The writer logically begins his discussion with Pigot's Case,¹ where it was said that if some of the covenants of an indenture are unlawful and others lawful, the latter will stand good. This appears to be the earliest case on the subject and has led to considerable conflict of authority.

If we suppose that A agrees to pay B \$100 in return for B's promise to do a lawful as well as a criminal act, it is conceded that the latter promise will vitiate the entire contract, no matter which of the promises has been performed.² If we suppose that B has promised to do a lawful act and one that is unlawful but not criminal or *malum in se*, the result may be different. It is true that B's unlawful promise being absolutely void can form no consideration for A's executory promise, and that the latter, being by hypothesis indivisible, falls to the ground through failure of consideration; and since A is under no obligation it is impossible to enforce B's promise.³ But if A has fully performed his part of the agreement, it is generally held that, though B's unlawful promise is still void, A may enforce the lawful promise of B, since there is now ample consideration for such promise and A's promise, being executed, needs no consideration. B on the other hand, whether he performs or not, will never be able to enforce A's promise, supposing it to be executory, since neither his promise nor its performance, which is against public policy, can support A's promise.⁴ A similar distinction between executory and executed contracts is sometimes made when B, who is already under a contract duty to C, makes a subsequent promise to A to perform such contract, in return for A's promise to pay. It may well be that such executory contract is of no effect because B has furnished no consideration for A's promise,⁵ but if A actually pays B for the subsequent promise he may hold B, though, of course, B, whether he performed or not, would never be able to compel A to perform.⁶

Passing now to contracts in which part of the consideration is unenforceable merely because of some defense, such as the statute of frauds, the learned writer reaches the conclusion that A should be allowed to hold B upon his lawful and enforceable promise, even though his own promise remains executory. A promise unenforceable because of the statute of frauds is generally considered as merely subject to a defense and in no sense illegal, and such a promise is sufficient to make A's promise binding.⁷ Since the contract is therefore valid, Mr. Rogers is undoubtedly correct in his conclusion that A may recover for a breach of the promise which is not subject to the defense of the statute of frauds without himself performing, provided, of course, such non-performance does not itself constitute a breach. It must also follow that B should be allowed the same right against A, for we have seen that B's promise can only be enforced when A is also bound. In accord with this view it has been held that when one party to a contract is protected by the statute of frauds he may nevertheless sue the other party for breach of his valid promise.⁸

¹ 11 Reports 27 a.

² See *United States v. Bradley*, 10 Pet. (U. S.) 343.

³ *Kearny v. Whitehaven Colliery Co.*, [1893] 1 Q. B. 700.

⁴ *Widoe v. Webb*, 20 Oh. St. 431.

⁵ See *Wald's Pollock, Contracts*, Williston's ed., 207.

⁶ *Ibid.* 208.

⁷ 12 HARV. L. REV. 424.

⁸ *Justice v. Lang*, 42 N. Y. 493.

While Mr. Rogers undoubtedly expresses the weight of authority, the law is by no means settled, and, as he himself admits, no general rules can be laid down against which authority cannot be cited.

- ACQUISITION OF STATE LAND BY THE FEDERAL AUTHORITIES, THE. *Acland Giles*. Discussing the power of the Australian federation to take land by eminent domain from the Australian states. 5 *Comm. L. Rev.* 49.
- ARMSTRONG COMMITTEE'S LEGISLATION, A STATEMENT CONCERNING MR. SAMUEL B. CLARKE'S ARTICLE ENTITLED "DEFECTS OF THE, RELATING TO THE DIVIDENDS OF MUTUAL LIFE INSURANCE POLICY-HOLDERS," AND MR. JAMES MCKEEN'S ANSWER. *William Trenholm*. 42 *Am. L. Rev.* 1.
- ASSUMPSIT, LIMITATIONS OF THE ACTION OF, AS AFFECTING THE RIGHT OF ACTION OF THE BENEFICIARY (Continued). *Crawford D. Hening*. 56 *U. P. L. Rev.* 73.
- CAPTURE OF NON-OFFENDING PRIVATE PROPERTY UPON THE HIGH SEAS DURING WAR, WOULD IMMUNITY FROM, BE IN THE INTEREST OF CIVILIZATION? *C. H. Stockton*. Maintaining that in some cases immunity might not be advisable. 1 *Am. J. of Int. L.* 930.
- CITIZENSHIP AND ALLEGIANCE IN CONSTITUTIONAL AND INTERNATIONAL LAW. *W. W. Willoughby*. 1 *Am. J. of Int. L.* 914.
- CONSIDERATION, VOID, ILLEGAL OR UNENFORCEABLE. *W. P. Rogers*. 17 *Yale L. J.* 338. See *supra*.
- CONSTITUTION OF THE UNITED STATES, THE ELEVENTH ARTICLE OF AMENDMENT TO THE. *William G. Guthrie*. 8 *Colum. L. Rev.* 183. See *supra*, p. 527.
- CONSTITUTION, THE THEORY AND PRACTICE OF THE. *Thos. B. Flint*. Showing that the Canadian government is essentially like that of Great Britain. 28 *Can. L. T. & Rev.* 114.
- COURTS FROM THE REVOLUTION TO THE REVISION OF THE CIVIL CODE, THE. *William H. Loyd, Jr.* A history of the development of Pennsylvania courts. 56 *U. P. L. Rev.* 88.
- DEPARTMENT OF STATE, THE HISTORY OF THE. I. THE DEPARTMENT OF FOREIGN AFFAIRS. *Gaillard Hunt*. 1 *Am. J. of Int. L.* 867.
- EXPATRIATION BY MARRIAGE, WOMAN'S. *C. A. Hereshoff Bartlett*. Discussing the subject generally and maintaining in particular that a United States statute allowing woman's expatriation by marriage is unconstitutional. 33 *L. Mag. & Rev.* 150.
- FILIPINO PEOPLE, THE PROGRESS OF THE, TOWARD SELF-GOVERNMENT. *E. W. Kemmerer*. Historical sketch of conditions before, during, and after Spanish control. 23 *Pol. Sci. Quar.* 47.
- GIFTS TO CHARITIES. SECTION XI, ACT APRIL 26TH, 1855. *Anon.* Collecting the Pennsylvania authorities. 12 *The Forum* 167.
- INSURANCE COMPANIES, DISTRIBUTION OF SURPLUS BY. *Herbert H. Reed*. Statistics showing that life insurance premiums are not equitably calculated. 42 *Am. L. Rev.* 12.
- INTERNATIONAL CONFLICTS, CAN ANY RIGHT OF DIRECT CITATION BE GIVEN TO A STATE IN? *Jacques Dumas*. Maintaining that nations should be compelled to arbitrate. 17 *Yale L. J.* 365.
- LAST CLEAR CHANCE, THE DOCTRINE OF. *George W. Payne*. Summary of the doctrine. 66 *Cent. L. J.* 215.
- LEGISLATION, THE METHODS AND CONDITIONS OF, IN OUR TIME. *James Bryce*. Maintaining that the legislature should be relieved by having the power to delegate its powers and by the use of scientific methods. 8 *Colum. L. Rev.* 157; 20 *Green Bag* 111.
- LIFE TENANTS AND REMAINDERMEN, RIGHTS OF, TO DISTRIBUTIONS OF STOCK AND CORPORATE ASSETS MADE BY CORPORATIONS TO THEIR STOCKHOLDERS. *Carroll G. Walter*. 42 *Am. L. Rev.* 25. See 20 *HARV. L. REV.* 147.
- MASTER, THE EFFECT OF LEGISLATION REQUIRING THE, TO GUARD DANGEROUS MACHINERY. *George W. Payne*. 66 *Cent. L. J.* 157.
- OIL TRUST AND GOVERNMENT, THE. *Francis Walker*. Abstracts of the reports of the Bureau of Corporations. 23 *Pol. Sci. Quar.* 18.
- PEACE CONFERENCE, THE SECOND. II. *A. H. Charteris*. Dealing with the proceedings concerning neutrals and the convention for arbitration. 19 *Jurid. Rev.* 347.
- REPRESENTATIVE GOVERNMENT, THE FUTURE OF. *F. N. Judson*. Maintaining that faults in representative government cannot be cured by increasing the number of elective offices. 2 *Am. Pol. Sci. Rev.* 185.

- ROMAN LAW AND MOHAMMEDAN JURISPRUDENCE. III. *Theodore P. Ion*. 6 Mich. L. Rev. 371.
- SUBTERRANEAN PERCOLATING WATER, SOME OBSERVATIONS ON THE RIGHTS OF LANDOWNERS IN. *Sumner Kenner*. Digesting the cases. 66 Cent. L. J. 194.
- SURRENDER CLAUSE, EFFECT OF, IN OIL LEASE. *Berkeley Minor, Jr.* Discussing the various theories. 14 The Bar 26.
- "TURNTABLE CASES," Should the Doctrine of the, Holding Railroad Corporations Liable for Injuries to Trespassing Children, be Extended so as to Make Land-Owners Liable for Injuries Caused to Trespassing Children by Unguarded Ditches, Ponds, etc. *Sumner Kenner*. 66 Cent. L. J. 137.

II. BOOK REVIEWS.

IN 21 HARV. L. REV. 228 (January, 1908) we printed a review of the second edition of Abbott's Practice and Forms, by Carlos C. Alden, published by Baker, Voorhis and Co., New York. In our review of this work criticism was made of the omission of ten of the most recently decided New York cases. Our attention has been called by the editor of the second edition to the fact that of these ten cases four were not omitted, but had been actually cited a total of eight times. In this matter we acknowledge our error, though we feel that it is possible that two of the cases were not cited in every section where they should have appeared. Of the remaining six cases the editor assures us that in his opinion five of them involve matters not within the scope of the work. On this point we do not feel convinced that our review was wrong, but we are glad to recognize the existence of a firm dissent from our criticism. For the injustice in our admitted error we feel the deepest regret.

THE LAW AND CUSTOM OF THE CONSTITUTION. By Sir William R. Anson. In three volumes. Vol. II. The Crown. Part I. Third Edition. Oxford: At the Clarendon Press. 1907. pp. xxvii, 283. 8vo.

Since the last edition of this work was published, Sir William Anson has been active in public life. Entering Parliament as a member for Oxford University in 1899, he was soon made Secretary to the Board of Education, and had the principal charge of carrying through the Education Act of 1902. No doubt these duties have delayed the preparation of another edition of his book, but students of English government will welcome even this instalment of a new edition, for the work is far the best that exists in its own field. That field cannot be easily defined, but the author has indicated it well in the title of his book, "Law and Custom of the Constitution." In most governments it is easy to distinguish the legal structure from the functions of the organs of the state; but in England this is not so, because the exercise of authority is limited, and even created, by conventions of the constitution which have no legal basis. In the English government, as in a rotary storm, structure and functions cannot be kept distinct. So far, however, as it is possible to separate them, Sir William Anson's book deals with the former, that is, with the law, and with those customs which may be said to form a permanent part of the British constitution, including such things as the responsibility of the ministers, and even the procedure for making appropriations in the House of Commons. It is worth while to keep an authoritative work in such a field well up to date.

In the subjects treated by the present volume—covering as it does the Crown with its councils, the ministers, and the departments of government—there has not been a great deal of change in the dozen years since the last edition came out. Perhaps the most striking change has been that in the Board of Education itself. But the new edition does much more than merely note the results of recent legislation. In one or two respects the book has been largely reconstructed. The author has abandoned his division of the public offices into executive and regulative; that is, into those which deal with the

necessities and luxuries of government—a division which was hardly logical, difficult for students to comprehend, and certainly not in accord with the unsystematic construction of British public offices. Instead, the author has arranged the different departments much more nearly in their historic order. Arrangement may be a small matter, but in this case it would seem to add distinctly to the clearness and value of the work.

The only considerable addition in the new volume is a much more extensive treatment of the historic evolution of the Cabinet in England. This is extremely interesting, and brings out many things in a short compass. The author points out, for example, how towards the end of the eighteenth century, after the idea of responsibility had taken root, there was still a tendency towards an outer and inner ring, a body of actual administrators who composed the effective Cabinet, while ex-ministers and others formed part of a larger Cabinet which bore towards the inner ring something of the relation that the Privy Council had borne to the Cabinet itself a couple of generations earlier.

At the end of his description of the Cabinet, the author discusses its relation with the House of Commons; and here he dwells upon the fact, which is undoubtedly true, that the last extensions of the franchise in 1867 and 1885 have made as wide a breach with the period that preceded them as the first Reform Act did between that period and the times of the unreformed Parliament. He points out "that from 1832 to 1867 a defeat in the House of Commons on what the Cabinet may have chosen to consider a vital issue was the ordinary mode of terminating the existence of a Ministry," but that in later years the fall of a Cabinet has commonly been brought about by a popular election. He points out that during the years between 1832 and 1867, or rather for this purpose 1886, the House of Commons possessed a larger measure of political power, and its members greater independence and freedom of judgment, than at any other period. Before that time the composition and conduct of the House was largely under the influence of the Crown and its servants. Since that time it has been under the control of the Cabinet and of party. Sir William Anson attributes the change rather to the introduction of single-member constituencies than to the extension of the franchise. But whatever one may think of the precise weight to be attributed to a particular cause, his statement of the result is unquestionably correct. "The consequence," he says, "of these various features of our political life at the present time is to make the House of Commons dependent on the Cabinet rather than the Cabinet on the Commons. The threat of a dissolution suggests to the supporters of a Ministry the certainty of expense and the possibility of defeat, and this possibility may assume a more formidable aspect if by-elections have resulted unfavorably to the Government. . . . A member may have ceased to be in sympathy with the leaders of his party, but he may also feel that small as will be his chances of re-election in any event, they would disappear altogether if he broke the bonds of party allegiance. In truth the Redistribution of 1885 has done much to destroy the independence of the members of the House of Commons. The power and influence which it has lost has gone partly to the Cabinet, partly to the constituencies, or rather in many cases, to the organizations by which the constituencies are worked."

A. L. L.

NEGLIGENCE IN LAW. By Thomas Beven. In two volumes. Third Edition. London: Stevens and Haynes. Philadelphia: Cromarty Law Book Company. 1908. pp. cciv, 1-726; xi, 727-1505. 8vo.

Mr. Beven's treatise on Negligence made its first appearance in a single volume, nineteen years ago. In 1895 a second edition was issued in two volumes, which is now superseded by the bulky tomes before us. That a new edition of this work was needed to keep it abreast of judicial decisions, will not be questioned by any one familiar with the output of the courts upon this most fruitful topic of litigation.

But the author has not contented himself with introducing into this edition the "1456 new cases on negligence" which have appeared in the English Law

Reports since the second edition was published. Some of the chapters have been rewritten throughout, and all have been altered "sufficiently to include a modifying amount of novelty." Of the first class are those in Book VII, on Unclassified Relations. While the heading of each chapter is unchanged, and while many paragraphs have been altered but little, this Book taken as a whole may properly be called a new production. For example, the discussion of *Young v. Grote* (4 Bing. 253) has been transferred from the chapter on Estoppel to that on Bankers. Moreover, the doctrine of this much criticized case is now limited to the relation of banker and customer, and is stated as amounting to this only: that the customer in that case, "by his neglect to use due caution, had caused his bankers to make payment on a forged order" (p. 1328). To what extent the author's view of *Young v. Grote* has changed can be seen by comparing the above quotation with the statements on pp. 1595-1599 of the second edition.

A good example of the chapters which have not been rewritten, but are modified to a noticeable degree by the introduction of late decisions, is that on Limits of Liability. Particular reference may be made to the portion dealing with liability for damages caused by fright, mental anguish, or nervous shock, when there is no physical impact. The very full discussion of this topic in the second edition is supplemented, here, by a careful and discriminating review of all the important English cases decided between 1895 and 1908.

While a few American cases of recent date are cited in this connection, no such prominence is given to them as is accorded to the supplemental English decisions. This is in accordance with the policy explained in the preface, of discontinuing the attempt, made in the former editions, "to present the law of the United States side by side with our own." The author writes: "I am convinced that such an attempt is impossible of success and also inexpedient. I have in my possession a vast American Treatise on Negligence. It is in six volumes, has 7741 pages and deals with 36,000 cases or thereabouts. Yet even in these generous limits very many American decisions on negligence of the greatest weight are not included. What hope then of dealing with a body of law so enormous in addition to our own? Moreover, the study of this Encyclopædia of Negligence has made plain to me what I before suspected—that, though of the same parentage as ours, American law has in late years been developing along divergent lines, and accepts principles widely applicable that are to us not only novel, but fundamentally unsound."

A characteristic feature of this treatise is its careful analysis and trenchant criticism of decisions which the author deprecates. *Stanley v. Powell* ([1891] 1 Q. B. 86) affords an excellent example. Mr. Beven expresses surprise that this should have been "introduced in a recent excellent and authoritative collection as a leading case," and adds: "What a leading case means in this connection I cannot say; but in my opinion *Stanley v. Powell* is not an authority for anything, but was decided on quite wrong grounds." In the body of the text (p. 569) he declares: "it would be a useless labour to follow the judgment through its confused and inaccurate review of the cases." Here, as well as elsewhere, Mr. Beven, to quote his own words (p. v), "has used considerable freedom in inquiring into the validity of the decisions arrived at."

Many a reader will prefer the rule laid down by Mr. Justice Denman, in *Stanley v. Powell*, to that contended for by the author; but every one who carefully studies the chapter in which that case and kindred cases are dissected and the author's rule is deduced, will bear witness to the ability and thoroughness with which Mr. Beven has dealt with the topic. And what is true of this chapter is true of the entire work.

F. M. B.

REPORTS OF THE AMERICAN BAR ASSOCIATION. Vol. XXXII. AN ESSAY ON PROFESSIONAL ETHICS. By George Sharswood. Fifth Edition. Philadelphia: T. & J. W. Johnson Company. 1907. pp. 196. 8vo.

In the present national searching of conscience the American Bar Association takes its part by proposing and discussing a code of professional ethics,

and it is in connection with this proposed code that this reprint of Judge Sharswood's book has been published. Eighty years ago De Tocqueville wrote that in America, "as the lawyers form the only enlightened class whom the people do not mistrust, they are naturally called upon to fill most of the public stations," and in 1854 his statement is corroborated by Judge Sharswood. Thirty years later, in his "American Commonwealth," Mr. Bryce tells us that "it is clear that the Bar counts for less as a guiding and restraining power . . . than it did. . . . The growth of the rich and powerful corporations, willing to pay vast sums for questionable services, has seduced the virtue of some counsel whose eminence makes their example important." And today lawyers are often actually objects of public distrust. This fall of the profession from the high prestige of the past has been accomplished by the influx of many who seek admission to the bar mainly for its emoluments. Such as these risk the loss of public esteem provided there is not entailed the loss of gold, and their risk is less because perhaps the public conscience has become passive, through frequent occurrence, to many acts which once would have been the cause of social ostracism.

It is from the codification of the elementary standards of the profession alone that help for this state of affairs may be sought, for gradually, as conditions warrant, courts may well require a submission to such principles as a condition precedent to admission to the bar. Of the worth in such a cause of Sharswood's "Professional Ethics" nothing need be said. It is one of the very few legal treatises of which a first edition published over fifty years ago is still valuable to the profession, for, though times and conditions have changed, the same qualities, today as then, make an honest man. It is to be wished that the book were more often and more widely read.

M. F.

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- TWO STUDIES IN INTERNATIONAL LAW. By Coleman Phillipson. London: Stevens and Haynes. 1908. pp. xviii, 136. 8vo.
- A TREATISE ON THE INCORPORATION OF CORPORATIONS. By Thomas Gould Frost. Third Edition. Boston: Little, Brown and Company. 1908. pp. xv, 909. 8vo.
- ON THE WITNESS STAND, Essays on Psychology and Crime. By Hugo Münsterberg. New York: The McClure Company. 1908. pp. 269. 8vo.
- LA PROPRIETÀ PRIVATA NELLE GUERRE MARITTIME SECONDO IL DIRITTO INTERNAZIONALE PUBBLICO. By Tullio Giordana. Turin: Società Tipografica Editrice Nazionale. 1907. pp. 301. 8vo.
- DELLA TRANSAZIONE SECONDO IL DIRITTO ROMANO. By Cesare Bertolini. Turin: Unione Tipografica Editrice. 1900. pp. xii, 422. 8vo.
- FOUNDATIONS AND RUDIMENTS OF LAW. By William T. Hughes. Vol. I. Chicago: Usona Book Company. 1908. pp. xv, 356. 8vo.
- DATUM POSTS OF JURISPRUDENCE. By William T. Hughes. Chicago: The Usona Book Company. 1907. pp. xiv, 250. 8vo.

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WHAT CONSTITUTES AN EXPRESS WARRANTY IN THE LAW OF SALES.

THE purpose of this article is to consider what promises or statements make a seller liable for the character or quality of the goods which are the subject of the sale. For the purpose of this discussion it is not material what obligations so created are collateral and what are part of the seller's primary promise. The single object is to determine when the seller will be liable, not how his liability may be enforced, or whether it will survive acceptance of the goods.

The law of warranty is older by a century than special *assumpsit*, and the action upon the case on a warranty was one of the bases upon which the law of *assumpsit* seems to have been built. The action on a warranty was regarded as an action of deceit, and the words "*warrantizando vendidit*" seem to have been necessary to make a good count as the words "*super se assumpsit*" later were in the action of *assumpsit*. The action on a warranty was thus conceived of at the outset as an action of tort.¹

This is, of course, also true of the action of *assumpsit*, but it was not long before *assumpsit* came to be regarded, as it is regarded to-day, as distinguished from tort and rather to be classed in its essential nature with covenant than with trespass on the case. But the right of action on a warranty was not regarded at once as similar in its nature to *assumpsit*. It was, indeed, not until 1778 that the first reported decision occurs of an action on a warranty brought in *assumpsit*,² though from the language of the courts in that case it

¹ Ames, History of Assumpsit, 2 HARV. L. REV. 1, 8.

² Stuart v. Wilkins, 1 Dougl. 18.

appears that the practice of declaring in *assumpsit* had been common for some years before. It is probable that today most persons instinctively think of a warranty as a contract or promise; but it is believed that the original character of the action cannot safely be lost sight of, and that the seller's liability upon a warranty may sound in tort as well as in contract. In the early case of *Chandelor v. Lopus*,¹ the court held that a declaration was insufficient after verdict which stated that the defendant affirmed a stone which he, as a goldsmith skilled in precious stones, sold to the plaintiff to be a bezoar-stone whereas it was not, and the court said: "the bare affirmation that it was a bezoar-stone, without warranting it to be so, is no cause of action; and although he knew it to be no bezoar-stone, it is not material, for every one in selling his wares will affirm that his wares are good, or the horse which he sells is sound; yet if he does not warrant them to be so, it is no cause of action." It seems a fair inference from this language that the use of the word warrant was necessary in order to make the seller liable, or at least words importing a direct and positive promise on the part of the seller. This attitude of the law is in conformity with the general unwillingness manifested by the early law to make any implication and to rely strictly on the exact form in which a transaction was put.

Lord Holt, however, decided that an affirmation of title in the seller, though not known to be false, and though not put in the form of a warranty or express promise, was ground for liability.² It was easy to take the same step in regard to warranty of quality

¹ Cro. Jac. 4.

² *Cross v. Gardner*, 1 Show. 68 (1689); s. c. Carth. 90; s. c. 3 Mod. 261. In this case the declaration alleged that the defendant sold oxen to the plaintiff "and did falsely affirm them to be his own, whereas in truth they were the oxen of another man." After verdict, it was moved in arrest of judgment that the declaration was not good because the plaintiff had not alleged that the defendant knew the oxen were not his own; but, nevertheless, the plaintiff had his judgment. It was said that it might have been good upon demurrer, but after verdict was well enough.

Medina v. Stoughton, 1 Lord Raym. 593; s. c. 1 Salk. 210 (1700). In this case the plaintiff declared that the defendant, being possessed of certain lottery tickets, sold them to the plaintiff, affirming them to be his own, whereas in truth they were not. The defendant pleaded that he bought them in good faith before the sale and so sold them in good faith. The plaintiff demurred, and Holt, C. J., said: "The plea is ill, and the action well lies. Where a man is in possession of a thing, which is a color of title, an action will lie upon a bare affirmation that the goods sold are his own." How far these decisions advanced beyond the earlier law is not perfectly clear, *Furnis v. Leicester*, Cro. Jac. 474; *Anon.*, 1 Roll. Abr. 90, 91, ff. 5-8, but Lord Holt at least made clear what was doubtful before.

that had previously been taken in regard to warranty of title. And though there is a dearth of authority during the eighteenth century, it is probable from the cases about the beginning of the nineteenth century that an affirmation of quality inducing a sale had for some time been recognized as rendering the seller liable as a warrantor. The gist of the action was the affirmation of the seller inducing the sale, irrespective of any fraudulent deceit on the seller's part. An action on the case for breach of warranty did not require an allegation that the seller knew his affirmation to be false, and if such allegation was made it did not need proof.¹

The nature of the action explains several features in the law of warranty that would have no proper explanation if the action sounded wholly in contract. The rule in regard to obvious defects is of this sort. There seems no reason why a seller should not promise to be answerable in damages for obvious defects, but his liability in tort is another matter. Just as in deceit it is essential that the statements must be such as to induce the plaintiff naturally to rely upon them, so in warranty this natural reliance on the seller's assertions was early regarded as essential. Chief Justice Brian said: "If a man sells me a horse and warrants that he has two eyes, if he has not, I shall not have an action of deceit, as I could know this at the beginning."² This was repeated in later cases, and the point of the remark was brought out by a later observation: "and the distinction is taken where I sell a horse that has no eye, there no action lies; otherwise where he has a counterfeit, false, and bright eye."³ It is obvious, however, that a buyer might rely on a seller's statement and be deceived, even though he could have found out the truth by careful inspection, and this was recognized before long.⁴

¹ *Denison v. Ralphson*, 1 Vent. 365, the second count stated a warranty that the goods sold were good and merchantable, and averred that the defendant delivered them bad and not merchantable, knowing them to be naught; the court observes that though the declaration be "knowing them to be naught," yet the knowledge need not be proved in evidence. In *Williamson v. Allison*, 2 East 446, 450, Lord Ellenborough said: "For if one man lull another into security as to the goodness of a commodity, by giving him a warranty of it, it is the same thing whether or not the seller knew it at the time to be unfit for sale: the warranty is the thing which deceives the buyer who relies on it, and is thereby put off his guard. Then if the warranty be the material averment, it is sufficient to prove that broken to establish the deceit: and the form of the action cannot vary the proof in that respect."

² Y. B., 11 Edw. IV, 6.10.

³ *Southerne v. Howe*, 2 Rolle 5. See also Y. B., 13 Hen. IV, 1.4.

⁴ *Butterfeild v. Burroughs*, 1 Salk. 211. This was an action for breach of warranty of a horse which lacked an eye. After verdict for the plaintiff it was objected in arrest of judgment "that the want of an eye is a visible thing, whereas the warranty extends

Another curiosity in the early law of warranty is found in a statement by Blackstone: ¹ "The warranty can only reach things in being at the time of the warranty made, and not things *in futuro*; as, that a horse is sound at the buying of him, not that he will be sound two years hence." An understanding of Blackstone's meaning requires reflection upon the origin of the law of warranty in an action based on deceit. It is, of course, law today that one may bind himself by contract for the happening of any future event, and a warranty of a piano for a year, for instance, is a contract to be answerable for any defect that may occur during that time.² When warranty is based not on an actual contract, however, but on an obligation imposed by law on the seller because of a misrepresentation he has made, the reason of the old rule is plain. It is commonly laid down in the law of deceit that a misrepresentation upon which an action may be founded must be in regard to an existing fact.³ This has been qualified, especially in recent times, by recognition that a promise is itself a representation of an existing intention.⁴ But this qualification is rather apparent than real, since the deception consists not in the future event to which the promise relates, but in the existing fact of the promisor's intention to keep it. It seems upon principle, therefore, that unless an actual contract can be made out, or unless representations as to future events carry with them necessarily a representation as to a present condition, as may often be the case,⁵ the statement of Blackstone is sound.⁶

only to secret infirmities, but to this it was answered and resolved by the court that this might be so, and was intended to be so since the jury has found that the defendant did warrant."

¹ 3 Comm. 165.

² So a warranty that metallic shells to be manufactured shall "finish sound." *Franklin Mfg. Co. v. Lamson Mfg. Co.*, 189 Mass. 344. See also *Osborn v. Nicholson*, 13 Wall. (U. S.) 654; *White v. Stelloh*, 74 Wis. 435.

³ Cooley, Torts, 3 ed., 929.

⁴ *Edgington v. Fitzmaurice*, 29 Ch. D. 459; *Swift v. Rounds*, 19 R. I. 527. So it was held in *Lederer v. Yule*, 67 N. J. Eq. 65, where a representation that a patent burglar alarm could be made cheaply was held a representation of a present fact.

⁵ Thus, a representation that a machine will work well for five years, is a representation as to its present condition in effect. The representation means that the machine as it stands is so well constructed as to be capable of enduring use for that period. So a representation that it will require a load of 250 tons to break it. *Miller v. Patch Mfg. Co.*, 101 N. Y. App. Div. 22. So a warranty of seed peas that they would "pick four or five days earlier than any other seed on the market." *Landreth v. Wyckoff*, 67 N. Y. App. Div. 145; *Richardson v. Mason*, 53 Barb. (N. Y.) 601; *Huntington v. Lombard*, 22 Wash. 202.

⁶ In *Houser's Case*, 39 Ct. Cl. (U. S.) 508, an assurance by the seller that the buyer

Though the idea of warranty as forming the basis of a tort has been lost sight of by many courts in this country in modern times, courts of the highest authorities have recognized that a plaintiff may sue in an action of tort for a broken warranty.¹ It is apparent that a seller may, if he chooses, make promises in regard to the character of the goods which will be binding on ordinary principles of contract, and for which it would seem that *assumpsit* was a more appropriate remedy than an action on the case, though even where there is a clear promise, if it relates to the existence of a supposed fact, the promise will be a representation or affirmation of the fact as well as a promise. But a promise is unnecessary, and most of the confusion in the law of express warranty is due to a failure to observe that a representation or affirmation by the seller which cannot without straining the facts be properly regarded as contractual (though the remedy of *assumpsit* and its equivalents may for convenience be permitted) is, and should be, a ground of liability for the seller.

In the light of this introduction some examination may now be made of the disputed points in the law of warranty. Cases which illustrate the rule that an express promise or an agreement to warrant, made at the time of the sale, renders the seller liable, need hardly be stated. But few definitions are more in conflict or more inaccurately stated than those defining what statements not made in the form of an express warranty or promise will render the seller liable. In Pennsylvania, following a strong bent given to the law by Chief Justice Gibson, the courts seem to have confined the seller's liability to cases where he makes an express promise.²

No other American jurisdiction seems to go as far as Pennsylvania in this respect, but many American authorities, especially

would have the right to remove shacks sold by the government until a certain day, was held to amount to a warranty that up to that time the seller would have authority to transfer title. In this case the seller may well have been regarded as contracting. In *Collins v. Tigner*, 60 Atl. 978 (Del.), the court ruled that it was essential that a warranty should be broken when made. This statement clearly needs qualification.

¹ *Shippen v. Bowen*, 122 U. S. 575; *House v. Fort*, 4 Blackf. (Ind.) 293, 295. See also *Gresham v. Postan*, 2 C. & P. 540; *Watson v. Jones*, 41 Fla. 241; *Tyler v. Moody*, 111 Ky. 191; *Hillman v. Wilcox*, 30 Me. 170; *Osgood v. Lewis*, 2 Har. & G. (Md.) 495, 520; *Place v. Merrill*, 14 R. I. 578; *Piche v. Robbins*, 24 R. I. 325; *Trice v. Cockran*, 8 Grat. (Va.) 442, 450.

² *Borrekins v. Bevan*, 3 Rawle (Pa.) 23, 42; *McFarland v. Newman*, 9 Watts (Pa.) 55; *Jackson v. Wetherill*, 7 Serg. & R. (Pa.) 480; *Wetherill v. Neilson*, 20 Pa. St. 448; *Holmes v. Tyson*, 147 Pa. St. 305; *McAllister v. Morgan*, 29 Pa. Super. Ct. 476; *Krauskoff v. Pennypack Yarn Co.*, 26 *ibid.* 506.

the older ones, require an "intention to warrant" on the part of the seller. By this requirement, however, is generally meant not what Chief Justice Gibson required, an intent to contract or to agree to be bound, but an intent to make a statement as matter of fact rather than as matter of opinion.

It was said by Buller, J., in a case which did not involve the question of warranty: ¹ "It was rightly held by Holt, C. J., in the subsequent cases, and has been uniformly adopted ever since, that an affirmation at the time of a sale is a warranty provided it appears on evidence to have been so intended."² This statement in regard to the necessity of intent to warrant seems to have no earlier foundation. The decisions of Holt, alluded to, say nothing about intent, and Blackstone mentions no such requirement in his treatment of the subject.³

In theory all that seems necessary is that the affirmation should have been such as to lead a reasonable man to believe that a statement of fact was made to induce the bargain. Even in the formation of ordinary contracts the only intent, or assent to contract, necessary is that words or conduct shall justify the other party in assuming a particular meaning. Accordingly, in England, little stress seems to have been laid on the requirement of intent,⁴ and in a recent case the doctrine was thus stated: "In determining whether it was so intended, a decisive test is whether the vendor assumes to assert a fact of which the buyer is ignorant, or merely states an opinion or judgment upon a matter of which the vendor has no special knowledge, and on which the buyer may be expected also to have an opinion and to exercise his judgment. In the former case it is a warranty, in the latter not."⁵

If this is the true meaning of the requirement of intent, it would seem better to find less misleading language to express the idea. The distinction stated in the language just quoted is between an affirmation of fact and a statement of opinion. What is to be

¹ *Pasley v. Freeman*, 3 T. R. 51. This was an action of deceit for a false and fraudulent statement by the defendant that a person with whom the plaintiff was about to deal was of good credit. It was held that a good cause of action was stated, although the defendant did not benefit by his false representation.

² P. 57.

³ 3 Comm. 164.

⁴ See, however, *Stucley v. Baily*, 1 H. & C. 405.

⁵ *DeLassalle v. Guildford*, [1901] 2 K. B. 215, 221. This statement was borrowed from Benjamin, Sales, 5 ed., 659. The passage has also the sanction of American authority. *Carleton v. Jenks*, 80 Fed. 937 (C. C. A.); *Roberts v. Applegate*, 153 Ill. 210.

regarded as an affirmation of fact and what a statement of opinion, will be hereafter considered.¹ But the apparent meaning of the word intent and the understanding of some courts at least seem to point to a requisite besides an affirmation of fact. The American cases are in great conflict. An examination of them discloses a growing tendency to regard a positive statement by the seller by way of description of the goods or in regard to them as binding; and the meaning of intent, if inserted in the definition of warranty at all, seems to be apparent intent to assert a fact rather than an intent to agree to be bound. This is far from settled, however, and it is not always easy to arrive at an exact understanding of the meaning of the words the courts use. The jurisdictions may be roughly separated into two classes—those which lay stress upon the seller's intent² and those which avoid the use of the word intent in this connection altogether. The best modern authorities are reaching the latter result.³

¹ *Infra*, p. 567.

² See note A, p. 576.

³ This is shown by quotations in note A, p. 576, taken from late decisions of the courts of Alabama, Illinois, New York, Vermont, Virginia, and Wisconsin. It is also stated in recent cases in other jurisdictions. In *McClintock v. Emick*, 87 Ky. 160, in reply to a question the seller of mules said that they were "all right." The plaintiff's petition averred that the defendant merely "represented" the mules were all right. It was held that the petition sufficiently stated a cause of action and the evidence justified recovery; the court said: "Some of the cases, however, seem to make the existence of a warranty depend upon the intention of the vendor; and it is urged in this case that the petition is defective in failing to aver that the appellant expected or intended the appellee to rely upon his representation in making the purchase. If the true construction of this class of cases is that the decision did not turn upon whether the party intended to be held by a warranty, but whether he intended to affirm a fact or merely express an opinion, then they are reconcilable with the cases which, in our opinion, correctly hold that if one even supposes that he is not making himself liable upon a warranty, yet if he makes a positive affirmation as to the condition of the property, or utters what is equivalent to a promise as to it, instead of expressing a belief merely, then such affirmation or promise amounts to a warranty, and he is liable upon it. It does not depend upon whether the vendor intends to be bound by his warranty or not, but upon whether he made an affirmation as to the condition of the article or merely expressed an opinion as to it."

In *Ormsby v. Budd*, 72 Ia. 80, the court held representations amounted to a warranty, and said nothing in regard to the seller's intent. In *Stroud v. Pierce*, 6 Allen (Mass.) 413, 416, the court said: "The defendant contends that it should have been left to the jury to find whether this language was used with the intent of affirming the fact or of expressing an opinion, but the intent of the party is immaterial." So in *Ingraham v. Union R. R. Co.*, 19 R. I. 356, a public announcement at an auction sale "that all horses about to be offered had been driven single, and that all horses which were not kind and safe to drive single would be specified at the time they were sold, was held to amount to a warranty that all horses then sold were kind and safe to drive singly

A troublesome distinction is sometimes made between what is called mere description and statements constituting a warranty. By mere description, it may be supposed, is meant words used simply for the purpose of identifying the goods. It is to be observed, however, that if descriptive words are used even for the purpose of identification, the description not only serves that purpose, but also inevitably represents that the goods correspond to the description, and is calculated to induce the buyer to purchase the goods on the assumption that the description is true. Accordingly if, as has been urged, it is unnecessary that the seller should in terms promise that his statements are true, or indicate an intention to be bound if they are not true, the seller should be liable. It was held in an early English case,¹ where the seller gave the following receipt, "received of [the buyer] 10 pounds for a gray, 4 yr. old colt, warranted sound in every respect," that there was no warranty of the colt's age, that being mere description. It is obvious that the seller's promise to warrant in this case related only to soundness, but that should give him no right to make positive untruthful assertions in regard to matters not included in the promise; the decision seems, therefore, erroneous.² If the statement, "warranted sound in every respect," had been omitted, the decisions presently to be referred to sufficiently show that the statement of age or any other descriptive statement would be a warranty. The addition of the warranty of soundness was undoubtedly for the purpose of giving the buyer an additional right, not for the purpose

unless the contrary were stated, and the court said: "Nor is it true, as sometimes stated, that the representation, in order to constitute a warranty, must have been intended by the vendor, as well as understood by the vendee, as a warranty. For if the representation as to the character or quality of the article sold be positive, and not mere matter of opinion, and the vendee understands it and relies upon it as a warranty, the vendor is bound thereby, no matter whether he intended it to be a warranty or not." See also *Shippen v. Bowen*, 122 U. S. 575; *Accumulator Co. v. Dubuque St. Ry. Co.*, 64 Fed. 70, 77 (C. C. A.); *Miller v. Moore*, 83 Ga. 684; *Harrigan v. Advance Thresher Co.*, 26 Ky. L. Rep. 317, 81 S. W. 261; *Greenshaw v. Slye*, 52 Md. 140; *Potomac Steamboat Co. v. Harlan, etc., Co.*, 66 Md. 42; *J. I. Case Machine Co. v. McKinnon*, 82 Minn. 75; *Wolcott v. Mount*, 7 Vroom (N. J.) 262; *Fairbank Canning Co. v. Metzger*, 118 N. Y. 260; *Northwestern Lumber Co. v. Callendar*, 36 Wash. 492, 498; *Huntington v. Lombard*, 22 Wash. 202; *Campbell v. Smith*, 13 Vict. L. Rep. 439.

¹ *Budd v. Fairmaner*, 8 Bing. 48.

² To the same effect is *Richardson v. Brown*, 1 Bing. 344. These decisions were followed in *Willard v. Stevens*, 24 N. H. 271, where the memorandum was as follows: "bought one red horse, 6 years old for \$125. which I warrant sound and kind," and *Anthony v. Halstead*, 37 L. T. (N. S.) 433. See *infra*, p. 566.

of restricting the seller's liability, and should not affect the question.¹ Occasionally decisions still refer to "matter of description," or "descriptive statements," as if those terms were inconsistent with a warranty.²

No doubt there is a distinction between matter of description and collateral warranties in regard to the question whether the promise of a seller is an integral part of a single contract or is a collateral bargain, if that question is important, as it is held to be in some states in determining whether a promise in a contract to sell is a warranty which survives acceptance of the goods. But the cases here criticized seem to hold that matter of description imposes no obligation whatever on the seller. The law, however, is now convincingly settled that descriptive statements do constitute a warranty, whether the seller makes them or whether the buyer in ordering goods makes them and the seller furnishes goods in response to such an order.³ Doubtless a description of goods by the

¹ See *infra*, pp. 565, 566.

² In *Shambaugh v. Current*, 111 Ia. 121, a description of cattle in a written contract as "thoroughbred" was held not to constitute a warranty on the ground that the word was merely descriptive. The case was followed in *Burnett v. Hensley*, 118 Ia. 575. See also *Carondelet Iron Works v. Moore*, 78 Ill. 65; *Baird v. Matthews*, 6 Dana (Ky.) 133; *Brown v. Baird*, 5 Okl. 133.

³ *Joaling v. Kingsford*, 13 C. B. (N. S.) 447 ("oxalic acid"); *Allan v. Lake*, 18 Q. B. 560 (turnip seeds were sold as "Skiving's Swedes"); *Bagley v. Cleveland Rolling Mill Co.*, 21 Fed. 159 ("same quality as last lot" of steel); *Flint v. Lyon*, 4 Cal. 17 ("Haxall" flour); *Miller v. Moore*, 83 Ga. 684 ("No. 2 white mixed corn"); *Americus Grocery Co. v. Brackett*, 119 Ga. 489 ("Texas red rust-proof seed oats"); *Henderson Elevator Co. v. North Georgia Milling Co.*, 126 Ga. 279; *Foos v. Sabin*, 84 Ill. 564 ("fat cattle"); *Telluride Power Co. v. Crane Co.*, 103 Ill. App. 647; *Aultman-Taylor Co. v. Ridenour*, 96 Ia. 638 (order for "twelve dingee horse power"); *Morse v. Moore*, 83 Me. 473 ("good clear merchantable ice, not less than twelve inches in thickness"); *Osgood v. Lewis*, 2 Har. & G. (Md.) 495 ("winter pressed sperm oil"); *Edgar v. Breck*, 172 Mass. 581 (bulbs of a named variety); *Gould v. Stein*, 149 Mass. 570 ("second-class Ceara rubber"); *Henshaw v. Robbins*, 9 Met. (Mass.) 83 ("blue vitriol"); *Wolcott v. Mount*, 7 Vroom (N. J.) 262 ("strap-leaf, red-top turnip seed"); *Hawkins v. Pemberton*, 51 N. Y. 198 ("paris green"); *White v. Miller*, 71 N. Y. 118 ("large Bristol cabbage seed"); *Abel v. Murphy*, 43 N. Y. Misc. 648 ("grape fruit"); *Lewis v. Rountree*, 78 N. C. 323 ("strained rosin"); *Northwestern Cordage Co. v. Rice*, 5 N. Dak. 432 ("pure Manila twine"); *Morse v. Union Stock Yards*, 21 Ore. 289 ("beef cattle"); *Hoffman v. Dixon*, 105 Wis. 315 ("rape seed"). See also *Timken Carriage Co. v. Smith*, 123 Ia. 554; *Hastings v. Lovering*, 2 Pick. (Mass.) 214; *Hogins v. Plympton*, 11 *ibid.* 97; *Van Wyck v. Allen*, 69 N. Y. 61; *Jones v. George*, 61 Tex. 345; *Drew v. Edmunds*, 60 Vt. 401. In Pennsylvania, however, in conformity with the narrow limits imposed by the law of that state on warranty, it is held that it is only in executory contracts to sell that the description of the goods imports a promise on the part of the seller. *Selsor v. Roberts*, 105 Pa. St. 242;

seller does not necessarily imply that the description is literally true, and if a reasonable person would not draw such an inference from the description, there can be no warranty of the literal truth of the description. In a Massachusetts case¹ the sellers manufactured chains known in the market as horn chains. The buyer bought of the seller "all the horn chains they manufactured." The chains regularly manufactured by the seller, though they were what were known as horn chains in the market, were made partly of horn and partly of hoof. It was held that there was no warranty that the chains were wholly made of horn. The court put as an illustration the case of a sale of "gold watches." There is, of course, no warranty that watches sold under that designation are made of gold in every part. So a sale of a "No. 4 fire-proof safe" does not carry with it a warranty that the safe is in fact absolutely fire-proof.² These cases are not, however, opposed to the rule. In each of the cases just put there was a warranty. The question simply related to the construction of its terms. What is the proper meaning of "horn chain," "gold watch," "fire-proof safe"? The seller warrants anything he sells by such a description to be the sort of thing that a reasonable person, having knowledge of any customs of trade bearing upon the matter and binding upon him, would be justified in calling by that name.

How far statements made previously to the bargain may constitute a warranty is another question upon which light is shed by considering that the obligation of warranty may sound in tort rather than contract. If it is essential to the seller's liability that he should contract for the truth of his statements, statements made long prior to the bargain will not often be ground for liability. But as such statements affect the seller's mind and the effect of them remains, they are frequently the inducement to an ultimate sale. If the statement, therefore, was a natural inducement to the bargain, and the seller ought to have so understood, he should be liable, though the statements were long prior to the bargain and not naturally to be regarded as forming part of the contract itself.³

Ryan v. Ulmer, 108 Pa. St. 332, 137 Pa. St. 310; Fogel v. Brubaker, 122 Pa. St. 7. See further, *supra*, p. 559, n. 2.

¹ Swett v. Shumway, 102 Mass. 365.

² Diebold Safe Co. v. Huston, 55 Kan. 104.

³ In some English cases still often cited, decided in the first half of the nineteenth century, it was held that an affirmation not made at the time of the sale could not constitute a warranty. *Camac v. Warriner*, 1 C. B. 356; *Hopkins v. Tanqueray*, 15 C. B. 130; *Stucley v. Daily*, 1 H. & C. 405. But later English cases have held

Another matter upon which it is of vital importance to understand that warranty may be tortious in character rather than contractual relates to the parol evidence rule. It is generally laid down that if the terms of a sale are reduced to writing, extrinsic evidence of a warranty not mentioned in the writing is not admissible.¹ Especially in modern times some qualification of this doctrine is to be observed in the cases. If the writing on its face does not appear to be a complete statement of the contract of purchase, the reason for the parol evidence rule is lacking and extrinsic evidence of a warranty should be admitted.²

the seller liable under such conditions. *Percival v. Oldacre*, 18 C. B. (N. S.) 398; *Cowdy v. Thomas*, 36 L. T. (N. S.) 22; *DeLassalle v. Guildford*, [1901] 2 K. B. 215, and so it has generally been held in this country. *Leavitt v. Fiberloid Co.*, 82 N. E. 682 (Mass.); *Powers v. Briggs*, 139 Mich. 664; *Way v. Martin*, 140 Pa. St. 499; *Selig v. Reh fuss*, 195 Pa. St. 200, 206; *San Antonio Machine Co. v. Josey*, 91 S. W. 598 (Tex., Civ. App.). See also *Wilmot v. Hurd*, 11 Wend. (N. Y.) 584; *Dayton v. Hooglund*, 39 Oh. St. 671; *Hobart v. Young*, 63 Vt. 363; *Crossman v. Johnson*, 63 Vt. 333; *Somers v. O'Donohue*, 9 U. C. C. P. 208. On the other hand decisions may be found, especially in jurisdictions which require an intent to warrant, to the effect that representations prior to a sale, though inducing it, did not amount to a warranty. *James v. Bocage*, 45 Ark. 284; *Bryant v. Crosby*, 40 Me. 9, 12; *Ransberger v. Ing*, 55 Mo. App. 621; *Doyle v. Parish*, 110 Mo. App. 470; *Byrd v. Campbell Printing Press Co.*, 90 Ga. 542.

¹ *Seitz v. Brewers' Refrigerator Co.*, 141 U. S. 510; *Chandler v. Thompson*, 30 Fed. 38 (C. C.); *Empire State Phosphate Co. v. Heller*, 61 Fed. 280 (C. C. A.); *Wilson v. New U. S. Cattle Ranch Co.*, 73 Fed. 994 (C. C. A.); *Buckstaff v. Russell*, 79 Fed. 611 (C. C. A.); *Davis Calyx Drill Co. v. Mallory*, 137 Fed. 332 (C. C. A.); *Whitehead v. Lane & Bodley Co.*, 72 Ala. 39; *Fitch v. Woodruff & Beach Iron Works*, 29 Conn. 82; *Allen v. Young*, 62 Ga. 617; *Martin v. Moore*, 63 Ga. 531; *Holcombe v. Cable Co.*, 119 Ga. 466; *Robinson v. McNeill*, 51 Ill. 225; *Telluride Power Co. v. Crane*, 208 Ill. 218; *Graham v. Eisner*, 28 Ill. App. 269; *Nichols v. Wyman*, 71 Ia. 160; *Barrett v. Wheeler*, 71 Ia. 662; *Rodgers v. Perrault*, 41 Kan. 385; *Diebold Safe Co. v. Huston*, 55 Kan. 104; *Thomson v. Gortner*, 73 Md. 474; *Rice v. Codman*, 1 Allen (Mass.) 377; *Frost v. Blanchard*, 97 Mass. 155; *Schramm v. Boston Sugar Refining Co.*, 146 Mass. 211; *Durkin v. Cobleigh*, 156 Mass. 108; *Otto v. Brame*, 142 Mich. 185; *Detroit Shipbuilding Co. v. Comstock*, 144 Mich. 516; *Nichols, Shepard & Co. v. Crandall*, 77 Mich. 401; *McCray Refrigerator, etc., Co. v. Woods*, 99 Mich. 269; *Zimmerman Mfg. Co. v. Dolph*, 104 Mich. 281; *Day Leather Co. v. Michigan Leather Co.*, 141 Mich. 533; *McCormick Harvesting Machine Co. v. Thompson*, 46 Minn. 15; *Eighmie v. Taylor*, 98 N. Y. 288; *Plano Mfg. Co. v. Root*, 3 N. Dak. 165; *Houghton Implement Co. v. Doughty*, 14 N. Dak. 331; *Bond v. Clark*, 35 Vt. 577; *Buchanan v. Laber*, 39 Wash. 410; *Johnson's Adm. v. Mendenhall*, 9 W. Va. 112; *Cooper v. Cleg-horn*, 50 Wis. 113; *Case Plow Works v. Niles & Scott Co.*, 90 Wis. 590.

² This principle was well expressed by Fuller, C. J., in *Seitz v. Brewers' Refrigerator Co.*, 141 U. S. 510: "Undoubtedly the existence of a separate oral agreement as to any matter on which a written contract is silent, and which is not inconsistent with its terms, may be proven by parol, if under the circumstances of the particular case it may properly be inferred that the parties did not intend the written paper to be a complete and final statement of the whole of the transaction between them. But such an agree-

It must be admitted that the principle thus stated is one very difficult of application, and the decisions cited in the two preceding notes are not all easy to reconcile on their precise facts. Another principle which has not yet been very clearly brought out by the cases should be clear wherever it is recognized that an affirmation or representation may form the basis of liability in warranty, even though there is no intent to warrant, and the representations cannot fairly be construed as an offer to contract. The basis of the parol evidence rule is that it must be assumed that when parties were contracting in regard to a certain matter and reduced their agreement to writing, the writing expressed their whole agreement in regard to that matter. This reason is obviously inapplicable to a situation where an obligation is imposed by law, irrespective of any intention to contract. Therefore, if a buyer is induced by positive statements of fact to enter into a written contract for the purchase of goods, there seems no reason why these statements should not be admitted in evidence. False and fraudulent statements inducing the formation of a written contract may of course be proved, and if a false but honest statement inducing the buyer to enter into the bargain renders a seller liable, though he does not intend to contract, there seems every reason for admitting evidence of such statements in spite of the fact that the bargain was reduced to writing.¹

ment must not only be collateral, but must relate to a subject distinct from that to which the written contract applies; that is, it must not be so closely connected with the principal transaction as to form part and parcel of it. And when the writing itself upon its face is couched in such terms as import a complete legal obligation without any uncertainty as to the object or extent of the engagement, it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking were reduced to writing. *Greenl., Ev., § 275.*" Other cases illustrating the doctrine are: *Allen v. Pink*, 4 M. & W. 140; *Florence Wagon Works v. Trinidad Mfg. Co.*, 145 Ala. 677; *Ruff v. Jarrett*, 94 Ill. 475; *Jackson v. Mott*, 76 Ia. 263; *Neal v. Flint*, 88 Me. 72; *Atwater v. Clancy*, 107 Mass. 369; *Leavitt v. Fiberloid Co.*, 82 N. E. 682 (Mass.); *Phelps v. Whitaker*, 37 Mich. 72; *Palmer v. Roath*, 86 Mich. 602; *Hersom v. Henderson*, 21 N. H. 224; *Perrine v. Cooley*, 39 N. J. L. 449; *Charter Gas Engine Co. v. Kellam*, 79 N. Y. App. Div. 231; *Brigg v. Hilton*, 99 N. Y. 517; *Mayer v. Dean*, 115 N. Y. 556; *Routledge v. Worthington Co.*, 119 N. Y. 592; *McMullen v. Williams*, 5 Ont. App. 518; *Hadley v. Bordo*, 62 Vt. 285; *Red Wing Mfg. Co. v. Moe*, 62 Wis. 240.

¹ This argument is fully supported by the case of *DeLassalle v. Guildford*, [1901] 2 K. B. 215. In that case, though the parties had entered into a former lease, a contract of considerable solemnity, the plaintiff was allowed to prove that he took the lease only on receiving an oral assurance that the drains were in order, and the defendant was held liable upon this as upon a warranty collateral to the lease. So in the case of *Waterbury v. Russell*, 8 Baxt. (Tenn.) 159, it was held that misrepresentations of

There are other troublesome questions in the law of warranty which are not affected by regarding warranty as the basis of a tort rather than of a contract. In order to make out either a tort or a contract it is necessary that the seller's statement shall amount to one of fact rather than opinion. Neither a representation nor a promise of what the seller thinks, at least if honestly made, can make the seller liable. It is not easy to draw the line accurately between affirmation of fact on the one hand, and statements of opinion on the other. Several distinctions may be noticed. In the first place it seems obvious that any statement may be put in the form of a statement of opinion. If the seller says a horse is sound, he affirms a fact, but when he states that he believes him to be sound, the only fact which he asserts is his belief, and if he does in fact believe the horse to be sound, he could not be held liable if the horse were not sound. Again there are some matters which are in their nature so dependent on individual opinion that, no matter how positive the seller's assertion, it is not held to create a warranty. Such assertions as that things are fine or valuable, or better than productions of rival makers, are of this sort. It should be noticed, however, that the continual tendency of the law is to restrict the seller in regard to untruthful puffing of his wares. A further test has been suggested; namely, that if the statement is in regard to something of which the buyer is ignorant and relies upon the seller for information, a statement of the seller would be a warranty; but if the matter was one in regard to which the buyer had as good opportunity for forming an accurate judgment, and was as competent to pass such a judgment as the seller, the statement will be matter of opinion. This test does not seem conclusive, however. Though a buyer has the opportunity and the skill to pass judgment upon goods, he may be induced not to do so by positive statements of the seller. If such statements are made for the purpose of inducing a sale and do induce it, there seems no reason why the seller should not be liable. In any event the question concerns rather the buyer's reliance on the assertion than the character of the assertion itself, and the question should be dealt with under reliance. A more detailed consideration of authorities may now be given.

the character of goods made to influence the bargain were warranties, though not inserted in the written contract of sale. But see *Telluride Power Co. v. Crane*, 103 Ill. App. 647, which held that such representations could not be shown unless fraudulent. See also *Leavitt v. Fiberloid Co.*, 82 N. E. 682 (Mass.).

Since the distinction between what are statements of fact and what are expressions of opinion involves a discrimination between expressions which gradually shade from one to the other, the best way of indicating where the line between the two is to be drawn is by stating a number of decisions on each side. It is to be noticed that the same sort of question which is involved in the law of warranty is also to be observed in actions of tort for deceit and proceedings to rescind a transaction on account of fraud. While it cannot be asserted that any statement which is too largely mere matter of opinion to amount to a warranty may not, at least if fraudulently made, be ground for an action for deceit or proceedings for rescission of a bargain, the converse statement may be made; that is, if a statement falsely and fraudulently made will not sustain an action of deceit or afford ground for rescinding a contract, it is still more clear that it cannot amount to a warranty.¹

The question whether a statement by the seller of an animal that it was sound is or may be a matter of opinion is one that has been much litigated. In the older cases the tendency was to hold that such a statement might be matter of opinion, although not so necessarily.²

The modern and better view is that such a statement positively made in such a way as to form part of the inducement of a sale is necessarily a warranty.³

Another class of cases that deserves special notice is that relating to statements of value. Such statements are generally expressions of opinion. The question more often arises in attempts to hold the seller for fraudulent conduct. A statement of facts upon which value depends is, however, an affirmation of fact. Therefore a statement of the cost of property or of offers received for it should be beyond the line allowed for seller's puffing.⁴

Even though a statement is of such character that it would be

¹ See note B, p. 579.

² See *Tyre v. Causey*, 4 Har. (Del.) 425; *Hawkins v. Berry*, 10 Ill. 36; *House v. Fort*, 4 Blackf. (Ind.) 293; *Baird v. Matthews*, 6 Dana (Ky.) 129; *Hazard v. Irwin*, 18 Pick. (Mass.) 95; *Whitney v. Sutton*, 10 Wend. (N. Y.) 411; *Erwin v. Maxwell*, 3 Murph. (N. C.) 241; *Inge v. Bond*, 3 Hawks (N. C.) 101. In Pennsylvania the court has gone still further and held such a statement no evidence of a warranty. See *supra*, p. 559, n. 2.

³ *Riddle v. Webb*, 110 Ala. 599; *Cummins v. Ennis*, 4 Del. 424; *Joy v. Bitzer*, 77 Ia. 73; *McClintock v. Emick*, 87 Ky. 160; *Hobart v. Young*, 63 Vt. 363.

⁴ See *infra*, note B, p. 579. See also *Phillips v. Crosby*, 70 N. J. L. 785, stated *infra*, p. 580; *Titus v. Poole*, 145 N. Y. 414; also stated *infra*, p. 580; *Oneal v. Weisman*, 88 S. W. 290 (Tex., Civ. App.).

regarded merely as an expression of opinion under ordinary circumstances, there may be cases where a seller is subject to an extraordinary duty. Thus, the seller may expressly warrant the correctness of his opinion.¹ So where statements are made by one occupying the position of a fiduciary or an expert, expressions which might not render a person of a different character liable, will be actionable. This is well settled in the law governing actions of tort or deceit,² and there seems no reason to doubt that in the law of warranty the same distinction should be taken. A third class of cases which may be suggested consists of cases where the seller's expression of opinion is made with knowledge of its falsity. But whether a knowingly false statement of the seller's opinion may ever afford ground for an action of deceit because of the seller's fraud, on the ground that a statement by the seller of what he believes is in itself a statement of his own mental attitude which he should have no right fraudulently to misrepresent, knowledge of the incorrectness of his opinion seems to be no ground of liability in the law of warranty.³

¹ *Aultman v. Weber*, 28 Ill. App. 91, the seller of a machine "warranted" that it would do as good work as any other in the market. This was held actionable. Had the buyer merely made a statement to this effect in the course of the negotiations, it may perhaps be doubted whether the court would have reached the same result.

So in *Briggs v. Rumely Co.*, 96 Ia. 202, the seller of a machine "warranted" it "to do as good work as any other separator of its size in the United States."

In *Hazelton Boiler Co. v. Fargo Gas Co.*, 4 N. Dak. 365, the sellers said, "we guarantee" that the boiler which was the subject-matter of the sale "will make a saving of at least 20 per cent in fuel as compared with any other horizontal boiler." This was held an actionable warranty. See also *McCormick Harvesting Machine Co. v. Brower*, 88 Ia. 607; *Iroquois Furnace Co. v. Wilkin Mfg. Co.*, 181 Ill. 582.

² *Cooley*, Torts, 3 ed., 925.

³ *Deming v. Darling*, 148 Mass. 504. This was an action for fraudulent representations for inducing the plaintiff to purchase a bond by representing that it was an A & I bond and that the mortgaged railroad was good security for it. Holmes, J., in delivering the opinion of the court said: "The language of some cases certainly seems to suggest that bad faith might make a seller liable for what are known as seller's statements, apart from any other conduct by which the buyer is fraudulently induced to forbear inquiries. *Pike v. Fay*, 101 Mass. 134. But this is a mistake. It is settled that the law does not exact good faith from a seller in those vague commendations of his wares which manifestly are open to difference of opinion, which do not imply untrue assertions concerning matters of direct observation (*Teague v. Irwin*, 127 Mass. 217) and as to which it always has been 'understood, the world over, that such statements are to be distrusted.' *Brown v. Castles*, 11 Cush. (Mass.) 348, 350; *Gordon v. Parmelee*, 2 Allen (Mass.) 212; *Parker v. Moulton*, 114 Mass. 99; *Poland v. Brownell*, 131 Mass. 138, 142; *Burns v. Lane*, 138 Mass. 350, 356. *Parker v. Moulton* also shows that the rule is not changed by the mere fact that the property is at a distance, and is not seen by the buyer. Moreover, in this case market prices at least were

Reliance of the buyer upon the seller's statement is also another requirement of the law of warranty. This reliance is obviously part of the gist of any right in tort, and from the standpoint of contract the acceptance by the buyer of the bargain offered to him is a kind of reliance. There is danger, however, of giving greater effect to the requirement of reliance than it is entitled to. It is, of course, true that the warranty need not be the sole inducement to the buyer to purchase the goods.¹ And as a general rule no positive evidence of reliance by the buyer is necessary other than that the seller's statements were of a kind which naturally would induce the buyer to purchase the goods and that he did purchase the goods.²

The difficulties which arise in regard to questions of reliance relate to several special classes of cases which may be classified under four headings, as follows: (1) obvious or known defects; (2) inspection; (3) statements made previously to the bargain; (4) statements made subsequent to the bargain. Consideration has already been given to the third class, but something may be said in regard to the others.

The rule in regard to obvious defects is not always clearly stated, and two conceptions exist which are not always kept separate. In the first place a warranty in general terms is held not to cover defects which the buyer must have observed.³ This is a rule of

easily accessible to the plaintiff." It may safely be assumed that the court would have been at least equally clear that the language complained of did not amount to a warranty.

In *Osborne v. McCoy*, 107 N. C. 726, 730, the court said of a statement of opinion: "If knowingly false, it might have been cause for an action of deceit, but it was no warranty."

In regard to the liability of the maker of such a statement for deceit rather than warranty, the reasoning upon which a promise made with intent not to keep it has been held fraudulent, may be considered.

¹ *Mitchell v. Pinckney*, 126 Ia. 696, 698, and see cases in this article, *passim*.

² *Shordan v. Kyler*, 87 Ind. 38; *Mitchell v. Pinckney*, 126 Ia. 696; *J. I. Case Co. v. McKinnon*, 82 Minn. 75.

³ *Thompson v. Harvey*, 86 Ala. 519; *Huston v. Plato*, 3 Colo. 402; *Marshall v. Drawhorn*, 27 Ga. 275; *Ragsdale v. Shipp*, 108 Ga. 817; *O. H. Jewell Filter Co. v. Kirk*, 102 Ill. App. 246, *aff'd* 200 Ill. 382; *Connersville v. Wadleigh*, 7 Blackf. (Ind.) 102; *Dean v. Morey*, 33 Ia. 120; *Storrs v. Emerson*, 72 Ia. 390; *Scott v. Geiser Mfg. Co.*, 70 Kan. 498; *Richardson v. Johnson*, 1 La. Ann. 389; *Brown v. Bigelow*, 10 Allen (Mass.) 242; *McCormick v. Kelly*, 28 Minn. 135; *Hansen v. Gaar*, 63 Minn. 94; *Branson v. Turner*, 77 Mo. 489; *Doyle v. Parish*, 110 Mo. App. 470; *Hanson v. Edgerly*, 29 N. H. 343; *Leavitt v. Fletcher*, 60 N. H. 182; *Schuyler v. Russ*, 2 Caines (N. Y.) 202; *Jennings v. Chenango County Ins. Co.*, 2 Den. (N. Y.) 75; *Day v. Pool*, 52 N. Y. 202; *Parks v. Morris Ax & Tool Co.*, 54 N. Y. 586; *Bennett v. Buchan*, 76 N. Y. 386;

construction, and is based on an endeavor by the court to give effect to the intention of the parties. If the seller of a horse which is obviously blind, and which both parties know to be blind, says he is sound, the meaning of sound as used in that connection must be sound except as to his eyes. The same rule is applicable to a defect which is not obvious, but of which the seller tells the buyer,¹ or which the buyer knows.² Doubtless the early authorities³ go beyond this and justify the rule that even if the seller said "I warrant his eyes are all right," the buyer could not recover. It may be supposed in such a case either that the seller did actually observe the defect, or that he did not. In so far as the supposition is that the buyer actually observed the defect the question may seem academic, but it is not altogether so; for though the defect may be observed, the nature or extent, or consequences of it, may not be. There seems no reason if the seller contracts in regard to an obvious defect or if he makes representations upon which the buyer in fact relies, why the seller should escape liability. It can hardly lie in his mouth to say that though he was making false representations or promises to induce the buyer to make the bargain, and the buyer was thereby induced, he should not have been. Certainly there is a growing tendency in the law not to allow that sort of argument.⁴ A well-recognized limitation on any doctrine freeing the seller from liability for statements or promises in regard to obvious defects is that if the seller successfully uses art to

Van Schoick v. Niagara Ins. Co., 68 N. Y. 434; Studer v. Bleistein, 115 N. Y. 316; Mulvany v. Rosenberger, 18 Pa. St. 203; Fisher v. Pollard, 2 Head (Tenn.) 314; Long v. Hicks, 2 Humph. (Tenn.) 305; Williams v. Ingram, 21 Tex. 300; McAfee v. Meadows, 32 Tex. Civ. App. 105; Hill v. North, 34 Vt. 604.

¹ Knoepker v. Ahman, 72 S. W. 483 (Mo., Ct. App.).

² Harwood v. Breese, 73 Neb. 521.

³ See *supra*, p. 557.

⁴ In *Norris v. Parker*, 15 Tex. Civ. App. 117, the court said: "There seems to be no good reason why a warranty may not cover obvious defects as well as others, if the vendor is willing to give it and the buyer is willing to buy defective property on the assurance of the warranty. If he relies on his own judgment alone, he does not rely on his warranty." "A special warranty on the sale of a horse may be made to cover blemishes or defects which are open and visible, if the intention to do so is clearly manifested," is the language of the Supreme Court of Minnesota in the case of *Fitzgerald v. Evans*, 49 Minn. 541. In *Watson v. Roode*, 30 Neb. 264, 271, it is said: "The seller may bind himself against patent defects, if the warranty is so worded." See also *Henderson v. R. R. Co.*, 17 Tex. 560; *Hobart v. Young*, 63 Vt. 363; *Powell v. Chittick*, 56 N. W. 652 (Ia.); *Williams v. Ingram*, 21 Tex. 300.

See also *Branson v. Turner*, 77 Mo. 489, stated *infra*, p. 580. *June v. Falkinburg*, 89 Mo. App. 563.

conceal the defects, the seller is liable.¹ That the buyer may be protected from the consequences of known defects by a warranty is well settled.²

Inspection may conceivably have a threefold importance in this connection. In the first place, if the defect was one which could be discovered by inspection, and the buyer did inspect the goods, it may be urged that the parties did not intend that the language used should cover this defect. This reasoning is analogous to that adopted in regard to obvious defects. An obvious defect, however, means a defect that is apparent upon casual inspection, and does not need careful or expert examination for its discovery. If the defect required examination of the latter sort, it is still more clear than in the cases of obvious defects that a seller who clearly promises or affirms that the goods are free from the defect which in fact vitiates them, will be liable. A second aspect in which inspection, or rather the right to inspect, may have a bearing on the seller's liability, arises where the buyer has full power and opportunity to inspect, and inspection if made would have disclosed the defective character of the goods, but the buyer fails to make the inspection. Whatever may be the law in regard to implied warranty,³ in the case of express warranty it is no defense that the buyer, had he inspected, might have found out the falsity of the seller's statements. The buyer is justified in taking the

¹ *Kenner v. Harding*, 85 Ill. 264, 268; citing *Chadsey v. Greene*, 24 Conn. 562; *Robertson v. Clarkson*, 9 B. Mon. (Ky.) 506; *Gant v. Shelton*, 3 *ibid.* 420; *Irving v. Thomas*, 18 Me. 418. To the same effect are *Armstrong v. Bufford*, 51 Ala. 410; *Roseman v. Canovan*, 43 Cal. 110; *Perdue v. Harwell*, 80 Ga. 150; *Brown v. Weldon*, 99 Mo. 564; *Biggs v. Perkins*, 75 N. C. 397.

² *Thompson v. Harvey*, 86 Ala. 519; *Fitzgerald v. Evans*, 49 Minn. 541; *Branson v. Turner*, 77 Mo. 489; *Samuels v. Guin's Estate*, 49 Mo. App. 8; *Watson v. Roode*, 30 Neb. 264, 43 Neb. 348; *Pinney v. Andrus*, 41 Vt. 631. In all these cases a defect in an animal which was the subject of the sale was observed by the buyer, and to induce the sale the seller warranted or represented the disease to be less serious than it in fact proved. The seller was therefore held liable. Cf. *Ragsdale v. Shipp*, 108 Ga. 817. There the buyer, examining an animal offered for sale and finding its throat swollen, asked the seller what was the matter with it? The seller replied that it had shipping cold and would be all right in a few days. There was nothing to show that the buyer did not have as full knowledge of the nature of the disorder as the seller. The statement was held to be merely an expression of opinion. The court does not decide, however, that if the other requisites of a warranty had existed, the fact that the defect was patent would have prevented the seller from being liable.

³ Courts sometimes fail to observe the distinction between express and implied warranty in this respect. See *e. g.*, *Egbert v. Hanford Produce Co.*, 92 N. Y. App. Div. 252.

seller at his word, and in relying upon the seller's statements rather than upon his own examination.¹

A third possible importance of inspection by the buyer is as excluding reliance by the buyer on any statement of the seller in regard to the goods. It was held in a recent decision in New York that such was the effect of inspection.² Such a decision, however, misinterprets the requirement of reliance. There is no reason in the nature of things why a buyer should not rely both on the seller's statements and on his own judgment. Observation shows that buyers constantly do this, and accordingly it is generally and rightly held that inspection by the buyer does not excuse the seller from liability for words which amount to an express warranty.³

If the seller's liability on a warranty is based on an agreement to contract, consideration is essential, and the requirement in an action on the case for deceit of reliance by the plaintiff on the defendant's statement also involves the idea of detriment suffered by the plaintiff's reliance upon the statement.⁴ If the statement

¹ *Thompson v. Bertrand*, 23 Ark. 730. The seller of a slave gave a warranty of soundness. The buyer might have discovered the unsoundness of the slave's feet and knee by examination. The seller was held liable upon the warranty. *Leitch v. Gillette-Herzog Mfg. Co.*, 64 Minn. 434. The seller of 500 iron bedsteads said that if the parts of one of the beds went together properly, the parts of all would do so. The buyer having found that one could be put together properly, made no further inspection. It was held that the plaintiff was entitled to recover, though had he set up more of the bedsteads he would have discovered that the parts would not go together properly. See also *Jones v. Just*, L. R. 3 Q. B. 197, 204; *First Bank v. Grindstaff*, 45 Ind. 158; *Meckley v. Parsons*, 66 Ia. 63; *Cook v. Gray*, 2 Bush (Ky.) 121; *Gould v. Stein*, 149 Mass. 570, 577; *Woods v. Thompson*, 114 Mo. App. 38; *Drew v. Edmunds*, 60 Vt. 401; *Barnum Wire Works v. Seley*, 34 Tex. Civ. App. 47; *Tacoma Coal Co. v. Bradley*, 2 Wash. 600.

² *Crocker-Wheeler Electric Co. v. Johns-Pratt Co.*, 29 N. Y. App. Div. 300, aff'd 164 N. Y. 593. The seller of material called "vulcabeston" represented that it was made of the best para rubber and selected asbestos, and that it was practically a perfect insulating material. Specimens were furnished the buyer, who experimented with them. The court said, as to the seller's statements: "They were not relied upon by the plaintiff or its predecessor; for, before making any contract, the officers of the plaintiff or its predecessor satisfied themselves, by their own investigation or experiment, that the representations made respecting the material and its sufficiency for their purposes were true. It is elementary that, in order to entitle the plaintiff to maintain an action for breach of an express warranty, it must be established that the warranty was relied on. Such was not the case here."

³ *Miller v. Moore*, 83 Ga. 684; *South Bend Co. v. Caldwell*, 55 S. W. 208 (Ky.); *Gould v. Stein*, 149 Mass. 570; *Smith v. Hale*, 158 Mass. 178; *Keely v. Turbeville*, 11 Lea (Tenn.) 339; *Woods v. Thompson*, 114 Mo. App. 38.

⁴ See *supra*, p. 557.

was unknown to the buyer at the time the sale was completed, it is obvious that there can be neither consideration from the standpoint of the law of contracts nor detrimental reliance from the standpoint of the law of deceit.¹

Still more clearly, if no warranty was made at the time of the sale, a subsequent agreement to warrant will be invalid unless new consideration is given for it.² What constitutes new consideration depends on the general principle of the law of contracts. If the buyer was entitled to return the goods for any reason, or in good faith claimed such a right, a warranty given to induce him to forbear to exercise it and to keep the goods is supported by sufficient consideration.³ But if the buyer had no color of right to return the goods, a warranty made subsequently to the sale as an inducement to the buyer to keep the goods,⁴ is not binding. Where the title to property has passed but the price has not been fixed, a warranty made as part of the agreement fixing the price is binding.⁵

It has been held that a purchaser at an auction sale, who exacts a warranty after the goods have been knocked down to him but before he has paid for them may enforce the warranty.⁶ A similar

¹ *Landman v. Bloomer*, 117 Ala. 312. It was held that where the only evidence of express warranty was a printed circular issued by the seller, a charge was properly given that if the evidence failed to show that the circular came to the buyer's knowledge there was no express warranty. *Lindsey v. Lindsey*, 34 Miss. 432.

² *Baldwin v. Daniel*, 69 Ga. 782; *Summers v. Vaughan*, 35 Ind. 323; *Farmers Ass'n v. Scott*, 53 Kan. 534; *White v. Oakes*, 88 Me. 367; *Cady v. Walker*, 62 Mich. 157; *Fletcher v. Nelson*, 6 N. Dak. 94; *Morehouse v. Comstock*, 42 Wis. 626. It need hardly be said that if a warranty forms part of the terms of the sale, no separate consideration need be shown for the warranty. *Standard Cable Co. v. Denver Electric Co.*, 76 Fed. 422 (C. C. A.), and cases in this article *passim*.

³ *Blaess v. Nichols & Shepard Co.*, 115 Ia. 373. Similarly, where goods are not promptly delivered by the seller and the buyer has the right to refuse to accept them, a warranty given to induce the buyer to overlook a breach of agreement is binding. *Ohio Thresher Co. v. Hensel*, 9 Ind. App. 328; *Congar v. Chamberlain*, 14 Wis. 258. Or where a written warranty made at the time of the sale did not accurately express the intention of the parties, one executed subsequently to correct the mistake is effectual. *Barton v. Chicago Covering Co.*, 113 Mo. App. 462.

⁴ *White v. Oakes*, 88 Me. 367; *Fletcher v. Nelson*, 6 N. Dak. 94.

⁵ *Vincent v. Leland*, 100 Mass. 432.

⁶ *McGaughey v. Richardson*, 148 Mass. 608. The court approved instructions laying down, in substance, "that if, before the money was paid and the horse was delivered, the question arose between the parties as to the form of the warranty to be given, and the parties agreed that these words of warranty should be written into the bill of sale as a part of the contract, and they were so written in, and the money was then paid and the horse delivered, the warranty would rest upon a good consideration, and would bind the defendant; but that if, after the horse had been delivered and the

decision has been made in regard to a sale not at auction.¹ So it has been held that a warranty made at any time before a delivery of the property will be valid.² These decisions cannot be accepted, however, without some qualification. Unless the buyer had some right or color of right for refusing to pay the price, a warranty given to induce him to do so would not be supported by sufficient consideration; for the payment of the price would be merely a performance by the buyer of what he was already under a legal obligation to do. Similarly, unless the buyer has a right, or color of right, to refuse proffered delivery of the goods, the acceptance of them will not be consideration sufficient to support a warranty.³

The parties may by agreement limit the effect of language which would otherwise be construed as an express warranty. The commonest illustration of this is where the seller makes statements in regard to the goods, but refuses to warrant the truth of the statements. Though the statements by themselves might be sufficient to constitute a warranty, the refusal not only indicates an unwillingness to contract for the truth of the statements, but also should put the buyer so on his guard that he would not be justified in buying in reliance upon them.⁴ The seller's refusal to warrant may, however, be so qualified as not to be inconsistent with justifiable reliance by the buyer. A refusal to warrant that a horse is sound, should not preclude the buyer from relying on a statement that the horse is five years old, or a statement that the horse is sound to the best of the seller's knowl-

money paid, the warranty was inserted by the defendant in the bill of sale, and the defendant was not bound by the contract of sale to insert it, but he voluntarily chose to put it in, then the defendant was not bound by it."

¹ *Douglas v. Moses*, 89 Ia. 40. Cf. *Erwin v. Maxwell*, 3 Murph. (N. C.) 241.

² *Webster v. Hodgkins*, 25 N. H. 128.

³ These decisions go back to the case of *Butterfeild v. Burroughs*, 1 Salk. 211, where the plaintiff declared that the defendant "sold him a horse" and warranted it, "whereupon" the plaintiff paid his money. It was objected in arrest of judgment that as the warranty was set forth it might have been made at a time after the sale, but the court held otherwise, "for the payment was afterwards, and it was that completed the bargain, which was imperfect without it." This decision was made at a time, however, when title to property did not pass until the price was paid, unless credit was expressly given. Therefore, until the payment was made in *Butterfeild v. Burroughs*, the title had not passed and the language of the court indicates this was the ground of decision. At the present day the presumption is that title passes as soon as parties are agreed upon the terms of the bargain and the goods are in deliverable condition. Consequently the mere fact that the price was not paid would not now show a bargain to be incomplete.

⁴ *Fauntleroy v. Wilcox*, 80 Ill. 477; *Lynch v. Curfman*, 65 Minn. 170; *Smith v. Bank*, 1915 113.

edge.¹ There are indeed some cases where an express written warranty was made as to one fact and the court refused to construe assertions as to other facts as a warranty.² It is probable that the ground of these decisions is that the seller's descriptive statements would not constitute a warranty even had there been no other warranty contained in the writings. On whatever ground they are rested, the decisions, which are most of them old ones, seem open to criticism, as are many of the older cases on warranty. That descriptive statements may constitute a warranty has already been seen.³ If this is granted, the express contract of warranty which the parties enter into does not seem to preclude a reasonable man from relying upon assertions as to other matters than those covered by the express contract. If then the buyer in fact relies upon such statements, an obligation should be imposed by law upon the seller as in other cases where he makes positive statements of fact upon which the buyer is justified in relying, although the words do not indicate an agreement to contract.

Samuel Williston.

¹ *Wood v. Smith*, 5 M. & R. 124.

² In *Richardson v. Brown*, 1 Bing. 344, a memorandum of the sale of a horse stated the subject of the sale as "a horse 5 years old, has been constantly driven in the plough, warranted." It was held that this was a warranty of soundness and did not cover the assertion in regard to the horse's age.

So in *Budd v. Fairmaner*, 8 Bing. 48, the following memorandum, "received ten pounds for a gray four year old colt, warranted sound in every respect," was held to give no warranty as to the age of the animal.

So in *Anthony v. Halstead*, 37 L. T. (N. S.) 433, this receipt, "received sixty pounds for a black horse, rising five years, quiet to ride and drive, and warranted sound up to this date, or subject to the examination of a veterinary surgeon," was held to give no warranty that the horse was quiet to ride or drive. See also to the same effect *Dickenson v. Gapp*, cited in 8 Bing. 50, and *Willard v. Stevens*, 24 N. H. 271.

³ *Supra*, p. 563.

NOTE A.

In *Berman v. Woods*, 38 Ark. 351, an order was given for a printing press based on representations in the seller's letters and catalogue of the size and capacity of the press. The press was sent, but the buyer claimed it was not in accordance with the statements. The court held that as the press did not correspond in one material respect, the size of the form which it would print, with the representations made in correspondence, rescission for breach of warranty might have been made if the buyer had acted promptly. As to the representations, the nature of which is not stated, in regard to the merits of the press made by the sellers in their circular, the court held that they did not amount to warranties; saying: "They are the usual artifices of enterprise and competition," and quoted 1 Parsons, Contracts, 588, to the effect that a purchaser "cannot rely upon all statements and assertions made by the maker in circulars concerning the article as a warranty that it will do what is stated."

An intention to warrant is also said to be necessary in *Hartin Commission Co. v. Pelt*, 88 S. W. 929 (Ark.).

In *Barnett v. Stanton*, 2 Ala. 181, the seller of clothing represented it to be "fresh, well-made, and suitable for the market." The court held that there was no warranty; saying, "No matter how positive the representation of the seller may be, it will be regarded as an expression of his belief, or opinion, unless it was intended and received as a stipulation that the property was of the quality represented."

In *McCaa v. Elam Drug Co.*, 114 Ala. 74, 86, the court said, however: "Every vendor, whether he be a dealer or not, is responsible for his representations or affirmations as to quality, which are more than expressions of opinion and which are relied upon, and upon which the party purchasing has the right to rely," and also: "The purchaser may have had no opportunity to examine the article, or, if subject to examination and in fact examined, he may not possess the requisite information to enable him to determine. In such a case, if the vendor affirms or represents the quality of the goods, as a fact, he is bound by such representation or affirmation."

It will be seen that in these statements nothing is said about the seller's intention.

In *Polhemus v. Heiman*, 45 Cal. 573, 578, the court defined a warranty as follows: "Any affirmation made at the time of sale as to the quality or condition of the thing sold will be treated as a warranty if it was so intended." In *McLennan v. Ohmen*, 75 Cal. 558, the court laid down the same rule, adding: "Whether it was so intended and the purchaser acted upon it are questions of fact for the jury."

In Illinois several early cases laid stress upon the intention of the seller. In *Ender v. Scott*, 11 Ill. 35, an instruction to the jury that "if the defendant represented in positive terms to the plaintiff before the exchange that the mare was sound, such positive assertion will amount to a warranty," was held to be erroneous because it was said that the plaintiff might not have intended the assertion as a proposition to warrant. Intention was also laid stress upon in *Adams v. Johnson*, 15 Ill. 345. In *Hanson v. Busse*, 45 Ill. 496, the court, though giving a definition of warranty which included the requirements of intention, held that in case of a sale by sample a representation that the bulk was as good as the sample, necessarily amounted to a warranty.

In *Reed v. Hastings*, 61 Ill. 266, 268, the court effectually limited its earlier decisions by holding that "the intention with which the representation is made is to be determined by the character of the representation made, and the object to be effected by it." The court further said, broadly: "When the representation is positive and relates to a matter of fact, it constitutes a warranty. . . . It surely cannot be the law that a vendor of a chattel is permitted to make any false statements of fact in relation to the article which he may choose to indulge in, thereby inducing the purchase, and not being accountable to the purchaser." The same test was applied in *Kenner v. Harding*, 85 Ill. 264, and in *Roberts v. Applegate*, 153 Ill. 210, 216.

In *Phillips v. Vermillion*, 91 Ill. App. 133, however, the court without citing any cases held that the question of intention was vital.

In Indiana the court lays stress on intent.

In *House v. Fort*, 4 Blackf. (Ind.) 293, the court held that a statement that a horse was sound, made to induce the sale, was not, *per se*, a warranty. "It is of itself only a representation. To give it the effect of a warranty there must be evidence to show that the parties intended it to have that effect."

So in *Jones v. Quick*, 28 Ind. 125, it was held that the words must have been "intended and understood" as a warranty. In *Smith v. Borden*, 160 Ind. 223, 228, the court does not put the matter so strongly: "Any positive representation, assertion, or affirmation, made by the seller during the pendency of the negotiations for the sale, not the mere expression of an opinion or belief, which fairly expresses the intention of the seller to warrant the article or property sold to be what it is

represented, will constitute an express warranty." See also *Bowman v. Clemmer*, 50 Ind. 10.

In *Ransberger v. Ing*, 55 Mo. App. 621, the court held that a mere assertion of the quality or condition of a chattel at the time of a sale is not, as matter of law, a warranty, but it is merely evidence thereof as it may tend to show the intention of the parties, which is a question for the jury.

In *Kircher v. Conrad*, 9 Mont. 191, the court held that a statement made by a seller that certain wheat was "spring wheat" was not a warranty. The court relied on *Shisler v. Baxter*, 109 Pa. St. 443, and *Lord v. Grow*, 39 Pa. St. 88, which do indeed support the decision of the Montana court, but, as has been seen, the law of Pennsylvania is peculiar.

Seixas v. Woods, 2 Caines (N. Y.) 48. In this case the seller advertised certain wood he had for sale as "brasilletto," and showed to the plaintiff an invoice of the wood received from the person who had sold it to him, describing the wood by that name. He also made out a bill of parcels to the plaintiffs for the wood under that name. In fact, the wood was peachum, but the defendant did not know it. This was held no warranty because it did not appear by the evidence that the seller so intended. Again, in *Swett v. Colgate*, 20 Johns. (N. Y.) 196, the court held a description of certain goods by the seller as "barilla" did not amount to a warranty that they were such. The law of New York, however, is no longer indicated by these cases.

In *Hawkins v. Pemberton*, 51 N. Y. 198, Earl, J., says: "It is not true, as sometimes stated, that the representation, in order to constitute a warranty, must have been intended by the vendor, as well as understood by the vendee, as a warranty. If the contract be in writing and it contains a clear warranty, the vendor will not be permitted to say that he did not intend what his language clearly and explicitly declares; and so, if it be by parol, and the representation as to the character or quality of the article sold be positive, not mere matter of opinion or judgment, and the vendee understands it as a warranty, and he relies upon it, and is induced by it, the vendor is bound by the warranty, no matter whether he intended it to be a warranty or not. He is responsible for the language he uses, and cannot escape liability by claiming that he did not intend to convey the impression which his language was calculated to produce upon the mind of the vendee."

In North Carolina early decisions laid stress on intent, and apparently by intent, meant an intent to contract. *Erwin v. Maxwell*, 3 Murph. (N. C.) 241; *Foggart v. Blackweller*, 4 Ired. (N. C.) 238. In *McKinnon v. McIntosh*, 98 N. C. 89, 92, however, the court says: "That for misrepresentation the vendor is liable as on a warranty 'if such representation was intended not as a mere expression of an opinion but the positive assertion of a fact upon which the purchaser acts,' and this is a question for the jury."

In Vermont the rule as to intention has been strictly applied until recently. In *Enger v. Dawley*, 62 Vt. 164, an instruction was requested that if a catalogue was used by the parties and referred to by them in completing the sale, and the defendant relied on statements therein and believed them to be true, they were, in legal effect, warranties. The court held the instruction correctly refused, saying: "To constitute a representation a warranty, it must have been so intended and understood by the parties, both vendor and vendee. *Beeman v. Buck*, 3 Vt. 53; *Foster v. Caldwell's Estate*, 18 Vt. 176; *Bond v. Clark*, 35 Vt. 577; *Houghton v. Carpenter*, 40 Vt. 588; *Pennock v. Stygles*, 54 Vt. 226; or, intended by the parties as a part of the contract. *Richardson v. Grandy*, 49 Vt. 22; or, have formed the basis of the contract; *Beals v. Olmstead*, 24 Vt. 114; *Drew v. Edmunds*, 60 Vt. 401." In *Hobart v. Young*, 63 Vt. 363, 369, however, the court modified its previous position, saying: "Any affirmation as to the kind or quality of the thing sold, not uttered as matter of commendation, opinion, nor belief, made by the seller pending the treaty of sale, for the purpose of

assuring the purchaser of the truth of the affirmation and of inducing him to make the purchase, if so received and relied upon by the purchaser, is deemed to be an express warranty. And in case of oral contracts, it is the province of the jury to decide, in view of all the circumstances attending the transaction, whether such a warranty exists or not."

In *Mason v. Chappel*, 15 Grat. (Va.) 572, 583, the court said: "No affirmation, however strong, will constitute a warranty unless it was so intended. If it is intended as a warranty, the vendor is liable, if it turns out to be false, however honest he may have been in making it; but if it is intended as an expression of opinion merely, or as simple praise or commendation of the article, he is not liable, unless it can be shown that he knew at the time that it was untrue." In later Virginia cases, however, less stress is laid upon intent. In *Herron v. Dibrell*, 87 Va. 289, the court held that statements made in regard to tobacco that it was "sound" and "redried" and in "good keeping order," amounted to a warranty. The court quoted with approval: "The general rule is that whatever a person represents at the time of the sale is a warranty." See also *Milburn Wagon Co. v. Nisewarner*, 90 Va. 714.

In *Giffert v. West*, 33 Wis. 617, the court held: "that an affirmation made by the vendor at the time of the sale amounts to an express warranty, if it appears on the facts stated or proven to have been so intended and received." In *Hoffman v. Dixon*, 105 Wis. 315, however, the court held: "An affirmation of the fact as to the kind or quality of an article offered for sale, of which the vendee is ignorant but on which he relies in purchasing such article, is as much a binding contract of warranty as a formal agreement using the plainest and most equivocal language on the subject. . . . The better class of cases holds that a positive affirmation of a material fact as a fact, intended to be relied upon as such and which is so relied upon, constitutes in law a warranty, whether the vendor mentally intended to warrant or not. The latter is the doctrine of this court, as indicated by numerous cases where it has been applied." To similar effect is *J. H. Clark Co. v. Rice*, 127 Wis. 451. See also *Bagley v. Cleveland Rolling Mill Co.*, 21 Fed. 159; *Unland v. Garton*, 48 Neb. 202; *Cole v. Carter*, 22 Tex. Civ. App. 457.

NOTE B.

In the following cases relief was allowed: *Sauerman v. Simmons*, 74 Ark. 563, an action of rescission for breach of warranty. Held a question for the jury whether representations as to a pump "that it would lift 35 feet on a straight lift" amounted to a warranty. *Mason v. Thornton*, 74 Ark. 46, an agreement that the price of the goods sold should be determined by the cost marks upon them was held to involve a statement by the seller that the marks purporting to indicate the cost did so in fact, and that tort for deceit would lie if the seller knew the marks to be inaccurate.

Burge v. Stroberg, 42 Ga. 88, a statement that a horse was 14 years old, held a warranty.

In *Trench v. Hardin County Canning Co.*, 67 Ill. App. 269, the seller wrote: "understand we quote you only on cases that are well made, tested, and in every way satisfactory for your work." This was held to create a warranty that cans bought thereafter were first class in every particular.

Forcheimer v. Stewart, 65 Ia. 593, a description of hams as "choice sugar-cured canvased hams" was held a statement of fact.

Latham v. Shipley, 86 Ia. 543, statements were made in a catalogue in regard to a machine that it was in "first class order," and in letters that "it will certainly do your work," the buyer had not seen the machine and relied on the seller's statements. Held, the seller was liable in damages for breach of warranty.

Stevens v. Bradley, 89 Ia. 174, the owner of hogs at an auction sale announced that

they were as "thrifty a lot as he had ever owned, and that he had been in the hog business a good many years." Held a warranty of soundness.

Harrigan v. Advance Thresher Co., 26 Ky. L. Rep. 317, statements in regard to a second-hand engine that it was "all right, in good condition," and "could do the work of any good twelve horse power engine" if untrue, justified recoupment in an action for the price.

McClintock v. Emick, 87 Ky. 160, a statement pending a bargain that mules were "all right" amounts to a warranty of soundness.

Bryant v. Crosby, 40 Me. 9, the statement that "sheep are young and healthy" is a statement of fact.

Morse v. Moore, 83 Me. 473, "good clear merchantable ice not less than twelve inches in thickness." These words were part of the seller's promise in a written contract and were held to amount to a warranty.

J. I. Case Co. v. McKinnon, 82 Minn. 75, an assurance that an engine had "ample power" to run a separator was held to render the seller liable as a warrantor.

Branson v. Turner, 77 Mo. 489. The seller wrote the buyer that he had a fine steer for sale, that the steer had a sore under his neck, "but that don't hurt him, it is most well." The buyer replied, "if your cattle are as good as represented you can deliver them." The steer was thereupon sent with others. It was held this amounted to a warranty.

Burr v. Redhead, 52 Neb. 617, statements that bicycles were to be of "good materials" and of the "highest possible grade" were held statements of fact.

Lederer v. Yule, 67 N. J. Eq. 65, a representation that a patented burglar alarm could be made as good as a sample for a specified price, was held ground for rescission for fraud. This necessarily involved a decision that the representation was as to matter of fact rather than opinion.

Phillips v. Crosby, 70 N. J. L. 785, representations by the seller of oil stock as to the lands owned by the company, the number of oil wells upon the lands and their productiveness. It was held that they should be submitted to the jury to find whether there was a warranty.

Money v. Fisher, 92 Hun (N. Y.) 347, on purchase of a bull the buyer asked if he was "fat and all right" and said he would purchase on that condition. The seller answered "yes." This was held a warranty.

Titus v. Poole, 145 N. Y. 414, on selling bank stock the seller stated that the bank was organized under the laws of Pennsylvania, that the stock was worth one hundred cents on the dollar, that it was good high dividend paying stock. It was held the seller was liable for these statements as upon a warranty that the stock was worth par and that the bank was organized as represented.

May v. Loomis, 140 N. C. 350, statements fraudulently made by the sellers of timber that they had had it carefully estimated and that the estimate showed a specified quantity, are statements of fact, and entitle the buyer to a counter-claim when sued for the price.

Reese v. Bates, 94 Va. 321, a statement that guano was "as good as any in the market" is a statement of fact.

Northwestern Lumber Co. v. Callendar, 36 Wash. 492, representations by the seller of machinery to make boxes, as to the worth of the machinery and the boxes made by it, were held warranties justifying a finding for the buyer in an action for the balance of the price.

Winkler v. Patten, 57 Wis. 405, statements that goods were "good bagging and gunnies" and were "far superior to any Chicago and Milwaukee packings" and were "worth 2½ cts. per pound" amounted to a warranty justifying the buyer in counter-claiming in an action for the price.

Milwaukee Machine Co. v. Hamacek, 115 Wis. 422, the seller's statement that . . .

engine was "as good as new in every particular" is an assertion of fact. See also *Lamme v. Gregg*, 1 Met. (Ky.) 444; *Dickens v. Williams*, 2 B. Mon. (Ky.) 374; *Young v. Van Natta*, 113 Mo. App. 550; *Love v. Miller*, 104 N. C. 582; *Reiger v. Worth*, 130 N. C. 268; *Beasley v. Surles*, 140 N. C. 605.

In the following cases relief was denied:

Chalmers v. Harding, 17 L. T. (N. S.) 571, a statement in regard to a reaping machine that it would "cut wheat, barley, &c., efficiently," held no warranty.

Brawley v. United States, 96 U. S. 168, a contract for the sale of an entire lot of goods, naming the quantity with the addition of the words "more or less." It was held that the representation as to quantity was merely an estimate of opinion.

Schroeder v. Trubee, 35 Fed. 652, a statement by the seller of stock, made in good faith, that dividends which had been declared had been earned and that the stock account was "all right," held no warranty.

Sleeper v. Wood, 60 Fed. 888 (C. C. A.), a statement that canned corn was of the "best packing of 1888" accompanied with "usual guaranty against swells," was matter of opinion.

Crosby v. Emerson, 142 Fed. 713 (C. C. A.), a statement by the seller of mining stock in regard to the value of the property, with prophecies as to the prospects of the company, held no defense to an action for the price. *Farrow v. Andrews*, 69 Ala. 96, a representation by a seller of guano that it was a good fertilizer, held no warranty.

Shiretzi v. Kessler, 37 So. 422 (Ala.), a statement that certain whiskey would meet the wants of the buyer's trade, held no defense to an action for the price.

Bain v. Withey, 107 Ala. 223, a statement that a patented article was "a valuable and useful improvement" held a mere expression of opinion and no defense to an action for the price.

Baldwin v. Daniel, 69 Ga. 782, a representation that a plow "would sell well in Mississippi," held a statement of opinion, and no defense to an action for the price.

Navassa Co. v. Commercial Co., 93 Ga. 92, a sale of a specific pile of guano "estimated" to contain 253½ tons was agreed upon. The purchaser was held bound to take the entire pile, though it contained 702¼ tons.

Towell v. Gatewood, 3 Ill. 22, statement in a bill of sale describing tobacco as "good first and second rate tobacco" held a statement of opinion.

Barrie v. Jerome, 112 Ill. App. 329, statements by a seller of Balzac's works that they were "nice books," "books that children love to read," were statements of opinion merely, and no defense to an action for the price.

Jackson v. Mott, 76 Ia. 263, a statement of the age of a horse was held erroneously ruled as warranty as matter of law. The question should have been submitted to the jury.

Shambaugh v. Current, 111 Ia. 121, and *Burnett v. Hensley*, 118 Ia. 575, a description of animals as "thoroughbred" was held not a statement of fact.

Gaar v. Halverson, 128 Ia. 603, statements that an engine was "practically as good as new," and was of sufficient power to drive the defendant's machinery, held expressions of opinion, and no defense to an action for the price.

Bryant v. Crosby, 40 Me. 9, a statement that "sheep would shear from 3 to 5 lbs. of wool per head, and that the buyer could pay for the sheep by the wool from the sheep in two years, and have wool left," a statement of opinion.

Rice v. Codman, 1 Allen (Mass.) 377, bill of sale of gunny cloth which specified the weight as "per foreign invoice" was held not a warranty that the actual weight corresponds with the invoice weight, and the seller was not liable in damages.

Deming v. Darling, 148 Mass. 504, a statement that a bond was "an A \$1 bond" was held a matter of opinion, not making the seller liable for fraudulent representations.

In *Morley v. Consolidated Mfg. Co.*, 81 N. E. 993 (Mass.), the plaintiff bought a second-hand automobile for about one-half the price of a new car. He used it several

months when the crank shaft broke and damaged the engine materially. The agent who sold the machine to the plaintiff said at the time of the sale "that the machine had been used as a demonstrating car and had been run about five hundred miles; that it was in first class condition and all right." The trial court ordered a verdict for the defendant, which was upheld, the court saying, "There was no express warranty, all that Read said as to the value and nature of the machine was mere sellers' talk."

Worth v. McConnell, 42 Mich. 473, a statement that a threshing machine "is a very good machine and will do very nice work" held not a warranty and no defense to an action for the price.

Linn v. Gunn, 56 Mich. 447, the seller of a stock of goods represented that the stock equalled in cost an amount shown by an inventory less an amount shown in his books as received from sales. The seller was held not liable. His statements were made in good faith and the purchaser was experienced.

Matlock v. Meyers, 64 Mo. 531, statement in regard to a mare that she is a "good mare" held not a warranty of soundness, and not to make the seller liable for a defect in her eyes.

Bartlett v. Hoppock, 34 N. Y. 118, a statement by an Ohio drover to a New York City stock buyer in regard to hogs that they were "suitable and proper for the New York market" was held matter of opinion. The hogs were open to inspection, and the court said: "the purchaser had much the better opportunity of knowledge, and were it otherwise it would not constitute a warranty in law." There was therefore no defense to an action for the price.

Stumpp v. Lynber, 84 N. Y. Supp. 912, a statement that roses offered for sale "were very fine stock" held not a warranty, and no defense to an action for the price. Cash Register Co. v. Townsend Grocery Store, 137 N. C. 652. Statements that a cash register "would do away with a book-keeper," "that the books could be kept on the machine," "that the machine could be operated by a person of ordinary intelligence," held to be statements of opinion, and no defense to an action for the price.

Osborne v. McCoy, 107 N. C. 726, a statement by the seller "that a horse was sound as far as he knew," honestly made, held no warranty.

Worrell v. Kinnear Mfg. Co., 103 Va. 719, a statement that a bid was as low as work in question could be done for and there was no profit at that price, held expressions of opinion, which did not justify rescission by the purchaser.

Baker v. Henderson, 24 Wis. 509, a statement that "trees had not been injured by exposure to the weather," held no warranty and no defense to an action for the price.

Elkins v. Kenyon, 34 Wis. 93, a statement of an agricultural machine that it would work "in all kinds of hay, grain, straw and other grass," held no warranty. See also Tabor v. Peters, 74 Ala. 90; Englehardt v. Clanton, 83 Ala. 336; Collins v. Tigner, 60 Atl. 978 (Del.); Roberts v. Applegate, 153 Ill. 210; Lynch v. Murphy, 171 Mass. 307; Bates County Bank v. Anderson, 85 Mo. App. 351; Anthony v. Potts, 63 Mo. App. 517; Walsh v. Hall, 66 N. C. 233; Oneal v. Weisman, 88 S. W. 290 (Tex. Civ. App.); Tenney v. Cowles, 67 Wis. 594.

UNIFORMITY OF LAW IN THE SEVERAL STATES AS AN AMERICAN IDEAL.¹

IV.—STATE COURTS VERSUS FEDERAL COURTS.

1. **C**ASES based upon rights conferred by federal law, or presenting federal questions, are usually brought in the federal courts, and in many instances must be brought in those courts. There are many questions of federal law which may be litigated in state courts, subject to a right of removal to the federal courts, or to review by the Supreme Court of the United States by writ of error to the highest court of the state in which a decision of the federal question can be had. The federal law is the supreme law of the land, but that quality of the federal law is the same whether it is construed and declared in a state court or in a federal court. It by no means follows as a corollary from the supremacy of the federal law that the federal courts are also supreme over the state courts. The rule as between the courts is, that when a court of either sovereignty has acquired jurisdiction of a cause, the courts of the other sovereignty will not interfere to prevent the exercise of jurisdiction by injunction or other writ against the court.² It is usually possible for counsel to get all cases involving federal questions before the federal courts for decision, whenever for any reason it is deemed desirable to avoid a decision of the question in a state court. This was illustrated with great clearness in the recent case of *Ex parte Young*,³—a case which also illustrates with great vividness the paramount quality of the federal law. The Attorney-General of Minnesota was forbidden by injunction issued by a judge of a circuit court of the United States from taking any steps against certain railroads to enforce the remedies or penalties specified in rate laws of the State of Minnesota,

¹ Continued from 21 HARV. L. REV. 526.

² See U. S. Rev. Stat. § 720. Peckham, J., says, in *Ex parte Young*, decided March 23, 1908, "an injunction against a state court would be a violation of the whole scheme of our government. If an injunction against an individual is disobeyed, and he commences proceedings before a grand jury or in a court, such disobedience is personal only, and the court or jury can proceed without incurring any penalty on that account."

³ 209 U. S. 123.

passed in April, 1907. In the performance of his duty, as he believed, as chief law officer of the state, the Attorney-General violated the injunction by applying in a state court for a writ of *mandamus* against the Northern Pacific Railway Company, and was fined for contempt by the federal court and committed to jail for non-payment of the fine. On a petition for *habeas corpus* under the original jurisdiction of the Supreme Court of the United States, the action of the circuit court was sustained. The state statute in question was one of a numerous class of statutes enacted by various states for the purpose of exercising public control over railroad corporations. The material point to notice here, in connection with uniformity of law, is the manner in which such statutes are likely to be construed and dealt with in state and in federal courts. The duty of construction is the same in each court, and the principles of construction applicable are precisely the same, but the opponents of the act were plainly desirous of bringing the question before the federal court, in preference to the state court. The statute was declared unconstitutional by the Supreme Court. The supposed law was a nullity, opposed to the national Constitution, and afforded no protection and conferred no rights. The case also brings into clear light a quality of the Constitution which has been perceived and noted by lawyers and publicists,¹ but probably has not been clearly perceived by the public. The national Constitution was framed in 1787 by men who learned their law from Blackstone. It is the strongest bulwark of individualism to be found in any constitutional government in the world. Socialism or collectivism probably can go farther and faster in England, where the dominant opinion of the electorate can control Parliament, than in the United States, where the clause in the Constitution prohibiting the enactment by a state of any law impairing the obligation of contracts, and the provisions of the Fourteenth Amendment, securing certain fundamental rights against state action, stand in its way.

Whenever the validity of any state statute is drawn in question on the ground that it violates the provisions of the national constitution, that question can be determined finally only by one tribunal, the Supreme Court of the United States. This tends to secure uniformity in a large class of state legislation by subjecting it to

¹ Dicey, *Law and Opinion*, 308; 21 *L. Quar. Rev.* 230; *Federalist*, No. 44, by Madison.

the provisions of one constitution and the construction of one supreme court.

2. When a question arising under the Constitution or laws or treaties of the United States has been decided by the Supreme Court, that decision is binding throughout the United States in both state and federal courts. The law upon that subject is uniform throughout the country. Under the clause in the Constitution conferring jurisdiction on the federal courts in cases arising between citizens of different states, cases are frequently brought in the federal courts which do not depend upon federal law. For example, in *Swift v. Tyson*,¹ decided by the federal Supreme Court in 1842, in an action by the indorsee against the acceptor of a bill of exchange, the question was whether a pre-existing debt was a valuable consideration for an indorsement and transfer of the bill. The acceptance was in New York, and upon ordinary principles subject to the law of New York. Judge Story, in delivering the opinion of the Supreme Court, announced the rule that in questions of commercial law not depending upon any local statute or positive, fixed, or ancient, local usage, the federal courts were not bound by decisions of state courts, but were bound to decide in accordance with their own views of commercial law. This doctrine has since been applied to other questions of general law not depending upon local usage or statute.

When once announced by the Supreme Court, this doctrine became the rule of action for all inferior federal courts. The effect was two-fold. In the first place, it created a new source of diversity in all parts of private law not depending upon statute or local usage by making it possible for the state courts in a given state, and the federal courts sitting within the same state, to adopt different rules upon the same question of law. This has happened in a number of instances. On the other hand, a second and more important effect of the decision in *Swift v. Tyson* was to give to the Supreme Court of the United States a great opportunity to aid in securing uniformity of private law throughout the country. In any state court where a question of private law not depending upon statute or local usage arose for the first time the opinion of the Supreme Court of the United States upon that question would naturally have great weight. As the court authorized to construe the Constitution of the United States, it held a position of para-

¹ 16 Pet. (U. S.) 1.

mount authority in relation to federal questions, and that circumstance lent weight to its decisions upon all other questions, especially as those decisions were binding in all inferior federal courts. Judge Story doubtless saw that situation in delivering the opinion in *Swift v. Tyson*. He was at all times a vigorous asserter of federal authority.¹ Once only, in *The Thomas Jefferson*,² where he followed the English rule then prevailing, and limited the admiralty jurisdiction to the ebb and flow of the tide, did he miss an opportunity to extend the judicial power of the United States. In *Martin v. Hunter*,³ in 1816, he declared that "the whole judicial power of the United States should be, at all times, vested either in an original or appellate form, in some courts created under its authority." In *De Lovio v. Boit*,⁴ while sitting in the circuit court, he vindicated the jurisdiction of the admiralty over contracts of marine insurance wherever made, a jurisdiction which was afterwards sustained by the Supreme Court.⁵ So in *Swift v. Tyson*, whether consciously animated by a purpose to extend the federal judicial power or not, he adopted a construction of the 34th section of the Judiciary Act of 1789 which gave to the federal courts independent coördinate authority with the state courts upon all questions of general law, and to the Supreme Court of the United States an opportunity to establish and maintain leadership of the state courts in the wide domain of private law. It is probable that all the judges of the Supreme Court at that time fully realized the importance and influence of the court. Thus Judge Catron, while dissenting in *Swift v. Tyson* upon the ground that one point decided by the court was not involved in the case, said: "whereas, if the question was permitted to rest until it fairly arose, the decision of it either way by this court probably would, and I think ought to, settle it."⁶ The rule in *Swift v. Tyson* is so important that a few illustrations will be submitted to show the manner in which the federal influence has worked.

In 1873 in *New York Central R. R. v. Lockwood*,⁷ the question was presented to the Supreme Court whether a common carrier could lawfully stipulate for exemption from liability for negligence of himself or his servants. The question arose in the case of a drover who shipped cattle at Buffalo to be transported to West

¹ 1 Story, *Life and Letters*, 254.

² 1 Wheat. (U. S.) 304.

³ *New England Marine Ins. Co. v. Dunham*, 11 Wall. (U. S.) 1 (1871).

⁴ 16 Pet. (U. S.) 1, 23.

⁵ 10 Wheat. (U. S.) 428 (1825).

⁶ 2 Gall. (U. S.) 398.

⁷ 17 Wall. (U. S.) 357.

Albany under a contract by which he was to accompany the cattle and take the risk of personal injuries from whatever cause. It was a question of importance to the whole country. A number of state courts had previously passed upon it, and the Court of Appeals of New York, the state in which the Lockwood case arose, had upheld the stipulation in favor of the exemption of the common carrier. The Supreme Court of the United States reached the opposite conclusion, in a unanimous decision, the opinion being written by Mr. Justice Bradley. Professor Gray has called attention to the influence exerted by the opinion of Judge Miller in *Nichols v. Eaton*¹ in spreading the doctrine of spendthrift trusts.² Similar observations will apply to the opinion of Judge Bradley in the Lockwood case. At the bar of New Jersey he seems to have been able to convince the Supreme Court of that state that the grantee in a deed purporting to be an indenture *inter partes* was liable in covenant, although the indenture was executed by the grantor alone.³ The reader may form some idea of the range of his learning and grasp of his mind as a judge by reading his opinions in *Norwich & N. Y. Transportation Co. v. Wright*,⁴ in *The Lottawanna*,⁵ and in the Civil Rights Cases.⁶ The Lockwood opinion is written in his best style. It combines a full presentation of the existing state of the law upon the question in the state courts and in England with original reasoning upon the principles of law and considerations of policy applicable to the case, and sums up the result in four conclusions, denying the right of a common carrier of goods or passengers to stipulate for exemption from responsibility for negligence of himself or his servants. A leading text-book says: "These conclusions, after so thorough an examination of the subject, may be said to have most decidedly turned the scale in favor of the exclusion of all contracts between carriers and their employers, exempting the former from the negligence, of every grade, of themselves or their employees or servants."⁷

It was fortunate also for the case of *Swift v. Tyson* that the

¹ 91 U. S. 716.

² Gray, *Restraints on Alien.*, 2 ed., Preface, v.

³ *Finley v. Simpson*, 2 Zab. (N. J.) 311. See Rawle, *Covenants for Title*, 5 ed, § 272, n. 5.

⁴ 13 Wall. (U. S.) 104.

⁵ 21 *ibid.* 558.

⁶ 109 U. S. 3.

⁷ 1 Hutchinson, *Carriers*, 3 ed., § 453. See also § 450, n. 24, and §§ 451 and 452.

opinion was written by an eminent judge. In 1842 Judge Story was at the height of his fame. His authority was especially strong in commercial law, but the opinion has the weakness which usually results from deciding more than the facts of the case require. The question presented was whether the taking of a bill in payment of a pre-existing debt was a valuable consideration sufficient to exclude equities of the acceptor against prior holders. The court went beyond this question and decided not only that a taking in payment, but a taking as collateral security for a pre-existing debt, was a valuable consideration sufficient to exclude all equities. The case seems to have been quite generally followed in the state courts upon the first point, but, less widely where the transfer was as collateral security.¹ It was contrary to the law of New York upon both points, and created a diversity between the law administered in the state courts and the federal courts within that state which continued — notwithstanding the hope expressed by Mr. Justice Clifford in *Brooklyn City Bank v. Nat'l Bank of the Republic*,² that the courts of New York would concur at no distant day³ — until the passage of the Negotiable Instruments Act in 1897. It was supposed by some authorities that this statute in section fifty-one settled the law in accordance with *Swift v. Tyson*.⁴ Other authorities have suggested that section fifty-one presents a question of construction.⁵ The Supreme Court of New York in the Appellate Division has held in two cases that taking negotiable paper merely as security does not constitute a holder for value within the meaning of the statute.⁶ The persistence of this question illustrates one of the dangers lying in wait for every statute which aims to codify the whole or any portion of our private law. It was well put by Lord Macnaghten on the Rule in *Shelley's Case*: "That was putting the case in a nutshell. But it is one thing to put a case like *Shelley's* in a nutshell, and another thing to keep it there."⁶ It is comparatively easy to put the law of negotiable paper into a uniform statute and to procure the enactment of that statute in many states. To keep it uniform will require the best efforts of an able bar and of many wise and learned courts.

¹ 1 Ames, *Cas. on Bills and Notes*, 650, n. 1, and 667, n. 1. See also 4 Am. & Eng. Encyc., 2 ed., 290 and n. 4; 291 and n. 2.

² 102 U. S. 14, 58 (1880).

³ See Dill, *Laws & Jurisp.*, 245.

⁴ Crawford, *Ann. Neg. Inst. Law*, 2 ed., 32, § 51; *Brewster v. Shrader*, 26 N. Y. Misc. 480.

⁵ Huffcut, *Neg. Inst.*, 333, n. 1.

⁶ *Van Grutten v. Foxwell*, [1897] A. C. 658, 671.

In 1872, in *Mutual Life Insurance Co. v. Terry*,¹ the Supreme Court of the United States passed upon the question of the meaning of a clause in a policy of life insurance providing that the policy shall be void if the person insured shall die by his own hand. At that time, as was said by Mr. Justice Gray in *Manhattan Insurance Co. v. Broughton*,² "there was a remarkable conflict of opinion in the courts of England, in the courts of the several states, and in the circuit courts of the United States, as to the true interpretation of such a condition." The Supreme Court decided that if the assured committed the act of self-destruction when his reasoning faculties were so far impaired that he was not able to understand the moral character of his act, it was not within the condition of the policy, and the insurer was liable. There is now strong authority in the state courts in favor of that view.³

In 1851, in *Little Miami Railroad Co. v. Stevens*,⁴ the Supreme Court of Ohio introduced into the law of master and servant a new rule known as the superior-servant rule, which was a great departure from the common law as laid down in *Farwell v. Boston & Worcester Railroad*.⁵ The action was by an engineer for personal injuries caused by the negligence of the conductor in charge of the train. The court held that "where an employer placed one person in his employ under the direction of another, also in his employ, such employer is liable for injury to the person of him placed in the subordinate situation, by the negligence of his superior."

This rule has produced diversity and confusion in the law of master and servant similar to that which *Lawrence v. Fox* produced in the law of contract. It spread from Ohio to other states, and there are now "no less than five distinct interpretations of the superior-servant limitation."⁶ The weight of the Supreme Court of the United States, after a period of uncertainty, was at last thrown decisively into the scale against the limitation, in *Baltimore & Ohio R. R. v. Baugh*⁷ and *New England Railroad v. Conroy*.⁸

¹ 15 Wall. (U. S.) 580.

² 109 U. S. 121, 127.

³ *Wambaugh, Cas. on Ins.*, 769 and n. 1; 19 Am. & Eng. Encyc., 2 ed., 77. See, however, *Daniels v. N. Y., N. H. & H. R. R.*, 183 Mass. 393, 399.

⁴ 20 Oh. St. 416.

⁵ 4 Met. (Mass.) 49.

⁶ 12 Am. & Eng. Encyc., 2 ed., 922.

⁷ 149 U. S. 368 (1892).

⁸ 175 U. S. 322 (1899).

There are signs that those decisions have had an influence upon the decisions of state courts.¹

Without a full and thorough examination of all the decisions in the state courts bearing upon the question it is impossible to measure accurately the effect of the rule in *Swift v. Tyson* in securing uniformity of law. That it has affected the course of decision favorably to uniformity in states where the law had not previously been settled seems reasonably clear. The state courts on their part, while freely acknowledging the duty of obedience to the Supreme Court upon all questions depending upon the Constitution, treaties, or laws of the United States, have firmly asserted their independent authority upon all questions of general law. No case has ever fallen under my notice where either a state or a federal court has yielded its own previously declared opinion to the other on a question of commercial or other general law. In 1848 the points decided in *Swift v. Tyson* were presented again in the highest court of New York, in *Stalker v. McDonald*,² where Chancellor Walworth re-examined the decisions in an elaborate opinion and concluded thus: "Nor do I think that the settled law of this state is so manifestly wrong as to authorize this court to overturn its former decision, for the purpose of conforming it to that of any other tribunal whose decisions are not of paramount authority." So in 1877, in *Mynard v. Syracuse, Buffalo & New York R. R.*, involving the question in the *Lockwood* case, the Court of Appeals by Church, Ch. J., said: "If we felt at liberty to review the question, the reasoning of Justice Bradley in that case would be entitled to serious consideration, but the right thus to stipulate has been so repeatedly affirmed by this court that the question cannot with propriety be regarded as an open one in this state."³ One incidental benefit resulting from the rule in *Swift v. Tyson* has been to stimulate elaborate discussions of opposing doctrines in several cases in the state and federal courts. The great case of *Hill v. Boston*,⁴ in Massachusetts, involving a fundamental doctrine in the law of municipal liability for negligence, is devoted largely to an examination of the grounds and authorities relied upon in *Barnes v. District of Columbia*,⁵ to which it is opposed. On the other hand, the point in the *Barnes* case was

¹ Rose, Notes on U. S. Reports, 3 Supp. 373, 376, 1062-1064; 75 Am. St. Rep. 580, and notes at 609, 625-626.

² 6 Hill (N. Y.) 93.

⁴ 122 Mass. 344.

³ 71 N. Y. 180, 185.

⁵ 91 U. S. 540 (1876).

before the federal Supreme Court again in 1889 and was affirmed.¹

In leaving this subject two considerations are submitted. (a) The uniformity of decision on questions of general law throughout the United States in the federal courts² is an impressive fact, in comparison with the numerous diversities, at times almost frivolous, in the rules of commercial law and general common law and equity which have grown up in the various states, and which stop at state lines. This spectacle is one fact which gives momentum to the federalizing tendency of the time, by causing men to long for the convenience and certainty which come from a uniform body of private law. (b) This spectacle of uniformity throughout the federal domain brings home impressively the good sense, one might say the vast wisdom, of the English judges in establishing and upholding the doctrine of the binding quality of precedents, both at common law and in equity.³ This rule came to the colonies with the English law. By means of it the entire judiciary of the nation is, as it were, consolidated into one body. The law as declared by the highest federal court is the law for all inferior courts within the jurisdiction. If this were not so, each court would stand by itself. Its decision would have no force except upon the parties to the cause. Such is the effect of the decision of a court, even of the highest court, on the continent of Europe. That, no doubt, is one reason why the courts of Europe do not hold the position of dignity and power which they enjoy in common law countries like England, or in the United States, where, by the written constitutions, they are erected into a coördinate branch of the government.

3. The federal courts, under the Constitution and laws of Congress, administer law and equity as separate systems, and have a uniform system of equity law and of equity procedure throughout the United States. There is no separate court of equity. In the states, on the other hand, there is no uniformity of method in dealing with equity. Four states have separate courts of chancery.⁴

¹ *District of Columbia v. Woodbury*, 136 U. S. 450.

² Of course there may be, and frequently has been, conflict of decision among different circuits until the question is passed upon by the Supreme Court.

³ See *Gee v. Pritchard*, 2 Swanst. 402, 414, per Eldon, L. C. (1818); *Osborne v. Rowlett*, 13 Ch. D. 774, 784, per Jessel, M. R. (1880).

⁴ New Jersey, Delaware, Tennessee, and Mississippi. Hartshorne, *Courts and Procedure*, 28-32 (1905), gives a list of six states besides New Jersey as having courts of chancery. He includes Vermont, Alabama, and Michigan, states where it seems that the chancellors or equity judges have also a common law jurisdiction.

In some states, as in Massachusetts, law and equity are administered in the same courts, but as separate systems under an equity procedure modified more or less by statute. In the code states law and equity are administered as one system in the same action. A cardinal principle of the code procedure is, "a single form of action for the protection of all primary rights, whether legal or equitable."¹ This is the so-called fusion of law and equity. It may be confidently affirmed, however, that no legislator has ever yet succeeded in fusing law and equity. No legislator ever will succeed who is not a master of both law and equity, and such a legislator probably will not attempt it. All that can be done is to confer upon the same court or magistrate what may be called the *in rem* jurisdiction of the common law, by virtue of which a right sued upon is extinguished by the judgment, and changed into an obligation of a different nature, and the *in personam* jurisdiction of the chancellor.² Practically the best results seem to be attainable by administering both systems through one court, but with separate divisions adjusted to meet the demands of public business. This is in substance the plan of the English Judicature Act.

4. In common law cases the federal courts have preserved the system of trial by jury substantially as it is used and practiced in England. In *Capital Traction Co. v. Hof* the Supreme Court decided, speaking by Mr. Justice Gray, that trial by jury under the Constitution "is a trial by a jury of twelve men, in the presence and under the superintendence of a judge empowered to instruct them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict if in his opinion it is against the law or the evidence."³ This rule secures the dignity of the court and gives to the community the benefit of the experience and wisdom of the judge in guiding the jury to just results and tends to provide and maintain a firm and steady administration of public justice. In some of the states the presiding judge in a jury trial is stripped of his common law power, required to instruct the jury in writing, and only upon subjects on which instructions are requested.⁴ Under this system, the speech of *Horne Tooke* to the jury,⁵

¹ Hepburn, *Hist. Development of Code Pleading*, 12.

² See Langdell, *Equity Pleading*, 2 ed., § 43, and n. 4.

³ 174 U. S. 1, 14 (1898).

⁴ See 11 *Am. & Eng. Encyc.*, 1 ed., 261-264; Thompson, *Charging the Jury*, Introduction and cc. V., VI.

⁵ Lord Kenyon inquired at the close of the plaintiff's evidence, Is there any defense? "*Horne Tooke* (taking a pinch of snuff, and looking round the court for a

intended no doubt as a studied insult to Lord Kenyon, comes too near the truth.

These four points of difference between the state and federal courts—to which may be added the further point that under the Constitution all federal judges “shall hold their office during good behavior”—are of such capital importance that differences in results in the work of the two systems in administering justice are likely to appear in time. The increase of business in the federal courts in recent years is a fact worthy of careful study. In 1872 Judge Curtis said to the students at the Harvard Law School: “When I came to the bar forty years ago, there were comparatively few cases tried in the courts of the United States. They were generally important cases, but they were few, and the number of practitioners engaged in those courts was small.”¹ At the present time some knowledge of federal law and practice is practically a necessity for every member of a state bar. In the competition, so to speak, between the state courts and the federal courts, it is of the utmost importance that the efficiency of the judiciary of the states should be maintained. If diversities in the laws of the states continue to increase, increasing dissatisfaction of the community may cause all persons who are interested in uniformity of law to unite in a general movement to extend the federal jurisdiction in the sphere of private law. If Congress should make the jurisdiction of the federal courts exclusive in every case to which the judicial power of the United States extends, the volume of business in the state courts would be diminished.

There is a strong tendency at the present time to extend the legislative power of the national legislature, especially in the regulation of interstate commerce. It is quite probable that in the future Congress will exercise control under the Constitution over subjects which have hitherto been left to the legislative action of the states. That tendency is increased by the unfortunate belief which is wide-spread among the people that state legislatures have not legislated with wisdom and fidelity to the public

minute or two): ‘There are three efficient parties engaged in this trial,—you, gentlemen of the jury, Mr. Fox, and myself, and I make no doubt that we shall bring it to a satisfactory conclusion. As for the judge and the crier, they are here to preserve order; we pay them handsomely for their attendance, and in their proper sphere they are of some use; but they are hired as assistants only; they are not, and never were intended to be, the controllers of our conduct.” 3 Campbell, *Lives of the Chief Justices*, 2 ed. (1858), 70.

¹ Curtis, *Jurisdiction U. S. Courts*, 1.

interests. The existence of this belief is proved convincingly by the many provisions¹ of modern state constitutions manifestly aimed at the restriction of legislative power. If, unhappily, the judiciary department of the states, or of a number of the states, should also fail in public esteem or confidence, what would become of the governments of the states? Without an upright and efficient judiciary the states cannot endure, Without the states the union of states cannot endure.

Uniformity of law in the several states gains new importance when viewed as a means of upholding the state courts as against the federal courts, and of preserving the just balance between the federal government and the governments of the states. Such uniformity cannot be attained or preserved merely by reducing the law or a portion of the law to a statute or code. It can be attained and preserved only by the united efforts of all who are engaged in the study or administration of the law, in a spirit of loyal devotion to the inherited systems of common law and equity which have descended to us from the past. The most effective organization of courts in the several states, with a view to secure to the public the best administration of justice, and to maintain the science of jurisprudence in spite of the mass of precedents and statutes and the bewildering diversity of rules, will come only through labors informed and inspired from the same great sources. Upon the quality of the work done by the judges, lawyers, and teachers of law in the United States, in their respective spheres, depends the future of uniformity of law in the several states, and, it may almost be said, the existence of state law, and of the states themselves as political sovereignties.

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¹ 1 Bryce, *Am. Comm.*, 3 ed., 444 and 468; Dicey, *Law and Opinion*, 9; 1 *Am. Pol. Sci. Rev.* 210; Reinsch, c. VIII., *The Perversion of Legislative Action*.

CONSTITUTIONAL QUESTIONS INVOLVED IN THE COMMODITY CLAUSE OF THE HEPBURN ACT.

THE Act of Congress approved June 26th, 1906, amending the Interstate Commerce Act of February 4th, 1887, provides:

"From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole, or in part, or in which it may have any interest direct or indirect except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier."

Three distinct classes of questions may arise under this provision. First: Has Congress power to pass such an Act? Second: What amounts to a violation of the Act? Third: What are the consequences to the carrier violating the Act, and the means given to the executive to enforce it? This article deals only with questions falling under the first class. There may be constitutional questions arising out of the penalties, if any, prescribed by Congress for a violation of the clause, or constitutional objections to the means given to the executive to enforce the Act. If there are such constitutional questions they are beyond the scope of this article, which deals only with the constitutional questions suggested by the section which has been recited.

The third paragraph of the eighth section of the first article of our federal Constitution gives to Congress the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." Is a law which prohibits an interstate carrier from carrying a product in which the carrier is directly or indirectly interested constitutional? The leading case on the Commerce Clause is *Gibbons v. Ogden*, decided in 1824.¹ In that case, under the guidance of Chief Justice Marshall, the Supreme Court

¹ 9 Wheat. (U. S.) 1.

held that a common carrier engaged in transporting goods or passengers between two or more states was engaged in interstate commerce. The soundness of this conclusion has never been doubted by any subsequent member of the court. A difference of opinion, however, has always existed in regard to the correct meaning of the word "commerce." Without violating the habits of English speech, the phrase "commerce among the states" may be understood as including every form of lawful intercourse between the peoples of the states. Again, it may be regarded as including only every form of intercourse for business purposes. Lastly, it may be interpreted as including the buying and selling of commodities, but nothing more. The case of *Gibbons v. Ogden* put at rest, apparently forever, the idea that the framers of the Constitution intended to confine the meaning of the word "commerce" to the third and most restricted sense in which the word is employed in common speech.² Since that decision the differences among the members of the Supreme Court have been confined to the other possible meanings of the word.

In view of the differences still existing among the members of the Supreme Court as to whether the first or the second view of the word "commerce" is the one intended by the framers of the Constitution, it is possible that under some circumstances even the act of transporting goods from one state to another might not be regarded by all the members of the court as interstate commerce.³ The act of transporting goods between the states may be undertaken in different ways and with different objects. The transportation may be by a common carrier. Here the contract of carriage for hire is a business contract, whether the shipper intends to use the goods himself on their arrival at their destination, or whether he intends to sell them. The act of carrying out this contract is interstate commerce. This was what was decided in *Gibbons v. Ogden*. But the owner of goods desiring to ship them to another state is not obliged to employ the services of a common carrier. He may himself transport them in his own wagon, intending either to use them himself on arriving at his destination, or to sell them.

² The writer has discussed the possible meanings of the word "commerce" and the decision in *Gibbons v. Ogden* in his essay on Marshall. See 2 *Great Am. Lawyers*, 369 *et seq.*

³ For a full statement of the conception that "commerce among the states" means only commercial intercourse, see the dissenting opinion of Chief Justice Fuller in the *Lottery Case*, 188 U. S. 321, 366.

Where the goods are transported in the wagon of the owner for the purpose of sale after their arrival in the other state, whether we adopt the narrowest view now possible of the meaning of the word "commerce" or not, the act of transporting is interstate commerce. It is part of the business intercourse between the states. The only case on which there can be any doubt is the case where A, owning goods in one state, for the purpose of his own use of these goods in another state, transports the goods to that other state in his own wagon. The Supreme Court has decided that goods transported from one state are subjects of interstate commerce until sold, or otherwise incorporated into the mass of property in the state of importation.⁴ The almost inevitable inference from this decision is that both the method and object of transportation are immaterial. If both the method and object of transportation are immaterial, even in our third case, the man who, changing his home, carries his household goods from one state to another, while engaged in their transportation, is engaged in interstate commerce. For our present purposes, however, a determination of this "neat point" is unimportant. The Act of Congress under discussion expressly allows the carrier to transport "such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier." In effect, the Act prohibits only transportation, for the purpose of sale, of goods owned directly or indirectly by the carrier. Therefore, even though we adopt the narrowest possible construction of the word "commerce," in view of the universally admitted soundness of the decision in *Gibbons v. Ogden*, the Commodity Clause directly affects commerce among the states.

The Constitution, however, does not read "Congress shall have power to prohibit in whole or in part interstate commerce." The power which is given to Congress is a power to "regulate." There has been and is considerable difference of opinion in respect to the extent of the power thus conferred. Three views are possible. The first is that the power given in the first article is an absolute power; that standing alone the article vests in Congress a power over interstate commerce as absolute as the power of one of the thirteen states over its foreign commerce prior to the adoption of the Constitution; that the power necessarily includes a power to license and a power to destroy. This view of course admits that

⁴ *Brown v. Maryland*, 12 Wheat. (U. S.) 419.

Congress is limited in the means which it may adopt to execute the power, but claims these limitations are not found in the first article, but in other parts of the Constitution, as in the first amendments.

The second view is that, while the power, being a power given to a sovereign government created for the very purpose of exercising the power, must be regarded as absolute, where not expressly limited, the power to regulate is from the very nature of the word itself a power which falls short, on the one hand, of the power to destroy, and, on the other, of the power to conduct. Under this view the federal government, without an amendment to the Constitution, could not arbitrarily prohibit interstate or foreign commerce in a recognized article of commerce, nor could it, without an amendment, operate the railroads of the country.

The third view is that, while the power given to Congress to regulate commerce may, on its face, be fairly construed to include both the power to conduct and the power to destroy, the power, like all other powers conferred in the Constitution on the federal government, is limited, not merely by the express limitations contained in the first amendments to the Constitution, but by "the nature of our federal state." One who adopts this last view will probably sanction the federal ownership and operation of the railroads; but would deny the right of the federal government to destroy interstate commerce in a recognized article of commerce, unless, perhaps, such destruction was fairly calculated to increase and benefit interstate commerce in other branches of trade, or protect the morals, health, or safety of the people.⁵

It cannot be said that the Supreme Court has ever definitely adopted any one of these three possible views. As a result no question, not decided, involving the meaning of the word "regulate" is free from doubt, unless the proposed regulation is clearly within all three possible views of the meaning of the word. The Commodity Clause meets this requirement. Irrespective of which of the three possible views of the meaning of the word "regulate" and the extent of the power conferred on Congress finds most support in the decisions of the Supreme Court, under any view Congress has in the first article power to pass a law which pre-

⁵ The writer has discussed the value of the conception that there exist limitations on federal power arising from the nature of our federal state, in an article on "Can the United States by Treaty Confer on Japanese Residents in California the Right to Attend the Public Schools?" 55 Am. L. Reg. (N. S.) (now U. P. L. Rev.) - 7

vents a common carrier engaged in interstate commerce from carrying between the states commodities in which it is directly or indirectly interested.⁶ Under the view that Congress under the

⁶ A passage from the opinion of Chief Justice Marshall in *Gibbons v. Ogden* may be quoted in support of the first view; he says: "We are now arrived at the inquiry, What is this power? It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution. . . . If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several states, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States." 9 Wheat. (U. S.) 196.

This assertion by the great Chief Justice has been often repeated. It has only recently been made the basis for the opinions of Mr. Justice White and of Mr. Justice Moody in *Employers' Liability Cases* (*Howard v. Illinois Central R. R. Co.*), 207 U. S. 463. And yet, though the spirit of the quoted passage from Marshall's opinion unquestionably tends toward the first view, it will be noticed that he did not say that the power to regulate was the power to destroy. He merely forcibly pointed out that under this article Congress has the absolute untrammelled choice of the means of regulation which it chooses to adopt. This untrammelled choice of the means of regulation does not necessarily involve the conception that absolute prohibition is regulation. For instance, Mr. Justice Harlan, in giving the opinion of the court in the *Lottery Case*, 188 U. S. 321, 356, which upheld the power of Congress to prohibit persons in one state sending lottery tickets into another state, said: "In this connection it must not be forgotten that the power of Congress to regulate commerce among the states is plenary, is complete in itself, and is subject to no limitations except such as may be found in the Constitution." But even the learned Justice just quoted is at pains to point out, later in the same opinion, that it will be time enough to consider the full extent of the power of prohibition possessed by Congress when Congress arbitrarily excludes from commerce among the states a useful article of commerce. P. 362.

The power to regulate interstate commerce for the promotion of such commerce has never been questioned; and it has been decided that where the act as a whole was fairly designed to protect or promote commerce a particular regulation, though it takes the form of a prohibition, is within the power of Congress. Thus the constitutionality of an Act of Congress prohibiting interstate railways from carrying cattle infected with a contagious disease has been assumed, *Reid v. Colorado*, 187 U. S. 137 (1902), and the Sherman Anti-Trust Act, prohibiting all contracts designed to restrain interstate commerce, has been repeatedly sustained. *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290 (1896); *United States v. Joint Traffic Ass'n*, 171 U. S. 505 (1898); *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211 (1899); *Northern Securities Co. v. United States*, 193 U. S. 197 (1904). The Supreme Court, though by divided vote, has gone further and upheld an act of Congress which, not for the benefit of interstate commerce, but for the benefit of the morals of the people of the United States, prohibited persons in one state sending lottery tickets to another state: *Lottery Case*, 188 U. S. 321 (1903). See also *In re Rahrer*, 140 U. S. 545 (1891). The act upheld in this last case was one passed to permit the states to prohibit the sale, by the importer, of liquor imported from another state, though the liquor was sold in the package in which it had been imported. The act was the result of the decision of the Supreme Court in *Leisy v. Hardin*, 135 U. S. 100 (1889), in which the court held

first article has absolute power to encourage or to destroy interstate commerce, the fact that the Act is within the power is manifest. The two other views merely limit the power conferred by requiring that the regulation shall stop short of arbitrary prohibition. Under any view, therefore, a law which is passed for the purpose of regulating interstate commerce — which does regulate and does not destroy — is within the power. The Act under discussion does not prohibit interstate commerce in any particular commodity or commodities. It applies only to the transportation of commodities. Here again, it does not prohibit the transportation between the states of any commodities, not even of commodities owned by the common carrier. The Act merely prohibits the transportation by the carrier of commodities in which it has an interest direct or indirect. In those cases in which the commodities have been manufactured, mined, or produced by a common carrier, or under its authority, the Act goes somewhat further and prohibits their transportation by the carrier, manufacturing, mining, or producing them, even though at the time of transportation it has no longer any interest in them. This is not a regulation of commodities, it is a regulation of the transportation of commodities by a common carrier. As it has been decided that the act of carrying goods for hire between two states is interstate commerce, any regulation of an interstate carrier which bears a reasonable relation to its duties as a common carrier of commodities between the states is a regulation of interstate commerce. The duties of a common carrier which has announced that it will carry commodities are to carry as safely and expeditiously as possible all commodities given it to carry by members of the public; charge reasonable rates of carriage; and treat all persons alike. That the ownership by a common carrier of some of the commodities it

that in the absence of any congressional legislation it was to be presumed that Congress desired interstate commerce in liquor to be free from state interference. The act upheld in the *Rahrer* case was merely an act declaring that Congress was willing that the states acting under the police power should prohibit the first sale. It may be questioned whether this case may be regarded as a regulation of interstate commerce in a recognized article of commerce for the purpose of promoting the morals of the people of the United States. For such use of the case see Mr. Justice Harlan's opinion in the *Lottery Case*, 188 U. S. 321, 358. Of course, if the power to regulate commerce extends to a power to prohibit any commodity from entering interstate commerce, then Congress may prohibit interstate commerce in liquor. For a government, having a power to legislate *in re* a particular subject, does not lose that power because the real motive behind the legislation is the accomplishment of a purpose on which no direct power of legislation exists.

carries is a condition tending to prevent the performance of the last two of these duties, and also perhaps to some extent the first, is a matter of common knowledge to those at all familiar with the history of our coal industry. It may be true that the evils tending to result from this condition not only vary in intensity with changes in industrial conditions, but that the evils themselves may be checked by other means than that adopted in this last enactment of Congress. Congress, however, is not limited in its choice of means except by the express prohibitions contained in the Constitution. If the end be within an express power, it is sufficient that the means adopted by Congress to accomplish the end bear a reasonable relation to that end. We may, therefore, fairly conclude that Congress under the power to regulate commerce among the states has the power to pass an act prohibiting interstate common carriers from carrying between the states for the purpose of sale commodities in which they are directly or indirectly interested.

But though the Act in question may be within the power granted to Congress in the first article of the Constitution, it is admitted by all that in regulating interstate commerce Congress cannot adopt a means prohibited by any of the first amendments. The means selected by Congress must not only be "legitimate," in the sense that it must be within the scope of a power expressly granted; it is also necessary that it should not transgress the rules expressly incorporated into the Constitution to protect the individual from the arbitrary exercise by the federal government of the powers granted to it in the first or in any other article of the Constitution.

The only amendment which would appear to have any bearing on the Commodity Clause is the Fifth Amendment, which provides:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

In this Amendment we have two rules designed to protect property: one relates to the taking of property without just compensation; the other to the deprivation of property without due

process of law. Does the Act under discussion as applied to any possible combination of circumstances which may arise under it, violate either of these provisions? The last clause of the Amendment is a general prohibition evidently binding on all branches of the federal government. Congress is prohibited from passing any law which takes property for public use without compensation. The words "for public use" are not words which limit the words "nor shall private property be taken." Property, even for a public use, cannot be taken without just compensation. *A fortiori* it cannot be taken without just compensation for a private use. Whether it can be taken for a private use even with compensation need not be discussed. At the time of the passage of the Act there were many railroad companies in the country which directly or indirectly owned coal lands and coal. It may be that there are other railroads which have acquired an interest direct or indirect in coal properties since the passage of the Act. Again, there may be companies who now wish to acquire coal properties and hereafter carry to market the coal mined from the properties they acquire. It is evident that the Act as applied to any of these three possible classes of companies does not take that part of their property which is now invested in their business as common carriers. We will consider later whether the Act as applied to a company owning a direct or indirect interest in coal lands may or may not be considered as taking from such company their coal property? But as far as the railroad property of the carrier is concerned, it is evident that, as applied to any possible combination of circumstances, the Act does not violate the last prohibition contained in the Fifth Amendment. If we look at the Act, therefore, from the point of view of its effect on the railroad property of the common carrier, the only question which arises under the Fifth Amendment is: Does the Act violate that clause of the Amendment which prevents the deprivation of property without "due process of law"?

The answer to this last question involves a consideration of one of the most intricate subjects in our constitutional law: Can a prohibition of a particular use or uses of property ever amount to a deprivation of property without due process? If a deprivation of use may under some, but not all, circumstances amount to a deprivation of property without due process, what are the circumstances under which it does amount to such a deprivation?

Before directly addressing ourselves to this question it is neces-

sary to dispose of certain preliminary matters. In the first place, was that part of the Fifth Amendment which provides that "no person shall be . . . deprived of . . . property, without due process of law," designed to protect the individual from arbitrary action by Congress, or was it merely designed to protect the individual from arbitrary judicial or executive action? If it was not designed to limit legislative power, its consideration in connection with the constitutionality of any act of Congress would be unnecessary. So also, as we have decided that the Act is within the power conferred by the first article, it would be unnecessary to consider the provision, if, though limiting the power of Congress, it was not designed to impose any special limitations on Congress, but merely to emphasize the fact that Congress could pass no law not authorized by some expressed grant of power contained in the Constitution. If the question were new, an examination of English history and of the text of the Amendment as a whole might well lead us to conclude that the prohibition in question was designed to protect the individual only from arbitrary and illegal oppression by the executive or judicial branches of the federal government. The clause in which the words "due process of law" appear is undoubtedly derived from the Thirty-Ninth Article of Magna Charta:

"No free man shall be seized, or imprisoned, or dispossessed, or outlawed, or in any way destroyed; nor will we condemn him, nor will we commit him to prison, excepting by the legal judgment of his peers, or by the laws of the land."

The terms "due process of law" and "laws of the land" would appear to be practically synonymous. That the Barons at Runnymede intended to force the King to act in proceeding against an individual under and not above the law, is clear; that they did not intend to curtail their own power to consent to a change in the law, is equally clear.

The framers of the Amendment evidently intended, by the use of the words "due process of law," to express the principle that their federal government was a government of laws, not a government of men. That they intended to do more than this is, to say the least, exceedingly doubtful, in view of the evident origin of the clause, its connection in the context with legal proceedings, and the fact that in the last part of the eighteenth century men were possessed by a dread of executive and judicial, rather than

legislative, oppression. However, this is a question which is no longer open for legal discussion. As long ago as 1856, Judge Curtis, speaking for the Supreme Court in the case of *Murray's Lessee v. Hoboken Land Improvement Company*, took the position that the restraint contained in this part of the Fifth Amendment is a restraint on "the legislative as well as the executive and judicial powers of the government, and cannot be so construed as to leave Congress free to make any process 'due process of law,' by its mere will."⁷ And in answer to his own question: "To what principles, then, are we to resort to ascertain whether this process, enacted by Congress, is due process?" he says:

"To this the answer must be twofold. We must examine the Constitution itself to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the immigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country."

It will be seen that Judge Curtis was not content to read the clause as prohibiting Congress from making a law contrary to the Constitution, or beyond the scope of the powers granted. He regarded the clause itself as incorporating into the Constitution, as additional restraints on legislative power, those fundamental principles which the history of England proves necessary to the preservation of individual liberty and private property. It is true that many of these principles, if not all, were incorporated separately in our federal Bill of Rights. But, if any were left out, the view stated by Judge Curtis is, that this clause, in requiring due process of law, gathers them in and adds them to the other restraints on the arbitrary exercise of power detailed in the rest of the Fifth Amendment and the other amendments to the Constitution.

The position taken toward the clause prohibiting the deprivation of property without due process by Judge Curtis, as a clause embodying important, if indefinite, restraints on legislative power, was not original with him. It had already been taken by several state judges and appears to have been the universally accepted meaning of the clause at the time of the decision of the case. Furthermore, since his decision, the views which he expressed

⁷ 18 How. (U. S.) 272, 276, 277.

have remained the views of the legal profession. They have been acted on again and again, not only by the Supreme Court, but by the courts of last resort of those states which have in their constitutions a similar provision.⁸ The fact that the clause in regard to due process of law is a restraint on legislative power, and the fact that the clause contains independent restraints on legislative power which may not be found in other parts of the Constitution, may now be considered settled legal propositions. Therefore it cannot be said that the Commodity Clause of the Hepburn Act is "due process" merely because it was regularly passed by Congress, is within the scope of its expressed powers, and is not contrary to any other provision of the Constitution.

There is another preliminary matter. The words "due process of law" might be taken to refer to the administration of justice. If so, though in this clause we have independent restrictions on legislative power, these restrictions would only prevent Congress from passing laws which provide arbitrary and unjust rules for the prosecution of civil and criminal causes. The decisions under the Fourteenth Amendment, however, render it impossible to give to the words "due process of law" such a restricted meaning. The Fourteenth Amendment provides:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

This Amendment has not only been held to deprive the states of the power to prescribe arbitrary rules for the conduct of legal proceedings, but to prevent a state passing any law which arbitrarily deprives those affected by it of their property, although the law which has this effect has no relation to judicial proceedings.⁹ It is true the words "due process of law" have a different setting in the Fourteenth Amendment than the same words in the Fifth Amendment. In the Fourteenth we have no special reference to the administration of justice, while all the rest of that part of the

⁸ A collection of state constitutions having a similar provision, and a fair collection of cases decided prior to and since the decision in *Murray's Lessee v. Hoboken Land Improvement Co.*, 18 How. (U. S.) 272, in which it is assumed, either by state or federal judges, that the requirement of "due process of law" is not only a prohibition on legislative power, but contains, in itself, special limitations not found in other parts of the Constitution, will be found in the notes to *Cooley*, Const. Lim., 7 ed., 500 *et seq.*

⁹ See cases collected by Judge Cooley, *supra*, note 8.

Fifth Amendment in which the words "due process of law" appear, relates entirely to this subject. Therefore, though it has been often held that the requirement of the Fourteenth Amendment in respect to "due process" prevents a state legislature from arbitrarily depriving persons of their property in any way, on account of the peculiar setting of the same words in the Fifth Amendment, it is possible to regard Congress as being only restrained from making arbitrary enactments in relation to the trial of criminal causes and other legal proceedings.

But although in the absence of a positive decision a fair argument can be advanced in favor of confining the prohibition of the Fifth Amendment to laws relating to legal proceedings, for the purpose of determining whether an act prohibiting a common carrier from carrying its own products violates the requirement of the Fifth Amendment in respect to "due process of law," it is much safer to start with the assumption that the Supreme Court will hold that Congress is restrained by this provision of the Fifth Amendment from passing any law which arbitrarily deprives a person of property, even though the law has nothing to do with legal administration. On the other hand, we may fairly conclude that the prohibition against deprivation of property without due process in the Fifth Amendment, while it may be less sweeping, is certainly not any more sweeping than the same provision in the Fourteenth Amendment; and that, therefore, if the Supreme Court has held a state law affecting private property to be constitutional in spite of the Fourteenth Amendment, they will hold a similar law passed by Congress to be within the requirements of this part of the Fifth Amendment.

As pointed out, the Commodity Clause, looked at from the point of view of the carrier as an owner of property devoted to its business as carrier — the railroad property of the railroad company, for instance — does not take from such carrier its property either directly or indirectly. It does, however, affect the possible uses to which the railroad company can put its railroad property. How far do the decisions under the Fourteenth Amendment — there are none on the point under the Fifth Amendment — discuss the question whether an interference with the use of property is a deprivation of property, and what bearing have these cases, if any, on the problem raised by the particular clause of the Hepburn Act under discussion? Perhaps the simplest way of answering these questions is to state, as succinctly as possible, the different classes of ways in

which legislation may directly affect the use of property without taking it, and show how far state legislation falling under each class has been held constitutional or unconstitutional.

First: Legislation may make more difficult any use to which certain property is put without making illegal any particular use. An example of legislation falling under this class would be an act which provided for a change of grade in the street in front of private property, or which partly closed such street by directing the erection of an elevated railroad or other structure. The Supreme Court has just held that this class of interruptions to use can never deprive the owner of the property adversely affected without due process of law; that an act of the state affecting the ingress and egress to property, for instance, is not a violation of the Fourteenth Amendment unless the local law of the state vests in the owner an easement in the street, which easement has been taken by the act without compensation.¹⁰

Second: Legislation may prohibit a particular use, which use, prior to the legislative enactment, was lawful; as acts prohibiting the keeping of pigs inside city limits or the manufacture of liquors in distilleries located in the state. In cases involving this class of legislation the Supreme Court has held that the legislature, acting under the police power, may pass such legislation without violating the Fourteenth Amendment, even though the act practically destroys the value of the property affected and fails to provide any compensation to the injured owner. Thus a law which renders useless the distilleries or breweries of the state by prohibiting their use as breweries and distilleries is constitutional, and the state is not required by the Fourteenth Amendment to provide compensation.¹¹ It is not certain, because the question has never arisen, whether an act which prohibited a particular use of property, which act the court would regard as outside the police power, could be passed by a state without compensating the owners of the particular class of property affected; indeed, it is not certain whether such an act could be passed at all.

Third: Legislation may prohibit the sale of certain property altogether, or the sale of particular property to a certain class or

¹⁰ *Sauer v. New York*, 206 U. S. 536 (1907).

¹¹ *Mugler v. Kansas*, 123 U. S. 623 (1887). See also a law prohibiting a fertilizing plant to be used in the only manner in which it was practical to use such plant, which has been upheld, *Fertilizing Co. v. Hyde Park*, 97 U. S. 27 (1878); also an ordinance depriving a person of the right to use his property as a laundry between the hours of ten in the evening and six in the morning. *Barbier v. Connolly*, 113 U. S. 27 (1885).

classes of persons. Here, again, acts falling under this class, passed under the police power, though they destroy the value of the property and provide no compensation to the owner, have been upheld by the Supreme Court in spite of the objection that they violated the provisions of the Fourteenth Amendment. A law prohibiting the sale of intoxicating liquor as applied to liquor already in existence within the jurisdiction of the state at the time of the passage of the act is a good example of legislation falling under this class which has been sustained by the court.¹³ Whether a state, outside of the police power, has the right, with or without compensation, to pass a law prohibiting the sale of commodities, is a question which the Supreme Court has not been called upon to decide.

Fourth: Legislation may regulate the price at which certain property shall be sold, or the price of some service in connection with a particular use of property. No state legislature has attempted to regulate the price of ordinary services, or the price at which commodities generally shall be sold. We do not know, therefore, if an act which attempted to fix the price of such an article as oil, entirely apart from the reasonableness of the price fixed, would or would not be "due process."¹⁴ All the state legislation falling under this head has been designed to regulate the charges of public service corporations. Here the Supreme Court has held that a state has the power to regulate the rate of charge, but that the rate fixed by the legislature must be reasonable.¹⁵ If the rate fixed does not permit a fair return on the property, which the common carrier or other public service corporation has embarked in its business, then the act deprives the company of its property without "due process of law."¹⁶

Certain things stand out clearly from the foregoing analysis of the decisions under the Fourteenth Amendment. In the first place it is interesting to note that it is not as yet certain that any law which attempts to deprive a person of a right to use his prop-

¹³ *Mugler v. Kansas*, 123 U. S. 623 (1887).

¹⁴ *Munn v. Illinois*, 94 U. S. 113 (1876); *C., B. & Q. R. R. Co. v. Iowa*, *ibid.* 155; *Peik v. Chicago & Northwestern R. R. Co.*, *ibid.* 164; *Chicago, Milwaukee & St. P. R. R. Co. v. Minnesota*, 134 U. S. 418 (1889); and *Budd v. New York*, 143 U. S. 517 (1891), seem to assume that the price of an article not affected by a public interest cannot be regulated by law. The point, however, has never been decided. For articles bearing on the subject, see 32 *Am. L. Reg. (N. S.)* (now *U. P. L. Rev.*) 1 and 9; 13 *Yale L. J.* 56.

¹⁵ See cases cited *supra*, n. 13.

¹⁶ *Chicago, Milwaukee & St. P. R. R. Co. v. Minnesota*, 134 U. S. 418 (1889).

erty, or even of a right to sell his property, would be regarded as a deprivation of property without due process of law. Under what we may call the railroad rate cases all that has been decided is that, if a public service corporation is obliged to perform a public service, the legislature must not, on the one hand, compel the performance of the services, and, on the other, deprive the company of a right to receive a reasonable return for them. In the second place, the power of a state to fix reasonable rates of charge for the services of a common carrier has never been doubted. Lastly, it is certain that a law which deprives a person of the use of property without taking the property, if passed under the police power, is not obnoxious to the requirement that no person shall be deprived of his property without due process.

Back of these conclusions lie apparently two ideas. One is that every state has a police power. The other idea is that every state has a special power to regulate common carriers subject to its jurisdiction. Regulations which might be obnoxious to the requirement that private property shall not be taken without due process of law when applied to ordinary occupations, are not obnoxious to that requirement when applied to a business affected with a public interest. It would seem, however, that the regulation of a common carrier, while in a sense it may be regarded as an exercise of a special power, is not an exercise of the police power, at least when the question of the constitutionality of the act in view of the requirement of due process of law is considered by the court. For instance, a regulation of rates which is not reasonable is not due process of law, though a police regulation which does not provide compensation for the injury done to the property affected, is due process of law. As the requirement of due process of law seems to be useless as a check on the police power, but operates as a check on all other laws, it is important to our present inquiry to determine whether the Commodity Clause of the Hepburn Act is an exercise on the part of Congress of a police power over interstate commerce. If it can be regarded as the exercise of the police power, then the clause requiring "due process of law" has no application. If, on the other hand, it is merely an exercise of a power of regulation like an act fixing the rates of fare, then the regulation, like a regulation of rates, must be reasonable.

In this place it may be asked: Does the power to regulate interstate commerce include a power of police over such commerce?

In answer to this question it can be said that there is no apparent reason why Congress, being the only power which can regulate interstate commerce, does not possess over that commerce all the powers of government, including the police power. The Lottery Case would appear to be a positive decision on this point.¹⁶ Congress prohibited persons in one state sending lottery tickets into another state. The majority of the court held this act to be constitutional. They refused to say that there exists a general power in Congress to prohibit interstate commerce in recognized articles of commerce; but they did decide that Congress could stop interstate traffic in such an article as a lottery ticket.¹⁷ What is this but affirming that Congress, provided the law acts only on interstate commerce, can legislate for the improvement of the morals of the people of the United States, and that acts for the improvement of morals may be due process of law, where similar acts for purposes beyond the scope of the police power would not be due process?

At the same time, though Congress may possess over interstate commerce the power of police, it does not follow that the Commodity Clause is an exercise of that power. It has been held that a law designed to protect the morals, the health, or the safety of the people is a police law. But our courts, including the Supreme Court of the United States, have very generally declined to define the limits of the power. The Supreme Court has never held that the "welfare" of the people as well as their health, morals, and safety, is within the police power. And therefore, though we may argue in favor of the proposition, we cannot positively assert that an act designed to make a common carrier live up to its public duties as a common carrier, which act has no relation to the morals, or health, or safety of the people, is a law passed in the exercise of a police power. It is, therefore, safer to conclude, though we may recognize that the conclusion is doubtful, that the Commodity Clause of the Hepburn Act was not passed in the exercise of a power of police. Not being passed as a police regulation, it follows that to prevent it from being obnoxious to the requirement of "due process," it must be reasonable. Again, the test of reasonableness as applied to this Act must be the same as that which is applied to rate regulation. The Act must not prevent the carrier from receiving a fair return from the property which it has embarked in its business as a common carrier.

Let us now turn to the facts. Admitting that the Act, if it de-

¹⁶ 188 U. S. 321 (1902).

¹⁷ See *supra*, n. 6.

prives any railroad company of its ability to receive a fair return on the property which it has invested in its business as a common carrier, deprives that company of its property without due process of law, by what possibility can the Act have such an effect? A regulation which prohibits a railroad from transporting its own goods, acquired or to be hereafter acquired, does not deprive the railroad of its ability to make full use and receive a reasonable return on all property which it has invested in its business as a common carrier. If the railroad did not own the goods at the time of the passage of the Act, it was not obliged to purchase them. If, on the other hand, it did own them, it may sell them again without affecting its ability to receive a full return on its railroad property. Under any view, therefore, or any circumstances which may arise, the common carrier as the owner of the property devoted to its business as common carrier is not, by the Commodity Clause, deprived of this property without "due process of law," contrary to the Fifth Amendment to the Constitution.

Down to this point we have regarded the common carrier affected by the Act under discussion as the owner of a railroad. Let us now look at the common carrier as an owner of property which it desires to carry to another state contrary to the provisions of the statute. There are two possible classes of cases: one where the property—such as coal—was owned by the carrier prior to the passage of the Act; the other, where the property has been acquired after the passage of the Act. We may ask, first: Does the Act, contrary to the last clause of the Fifth Amendment, in either case take the property of the common carrier which it has devoted to production, or desires so to devote? Unquestionably not. There is in neither case any physical taking, and while the Supreme Court has held that an act which amounts to a physical taking, as the overflowing of land with water, may be a taking within such a provision as that contained in the last clause of the Fifth Amendment, it has never been intimated that placing a person in a position where it is economically desirable, or even necessary, that he should dispose of certain property, is a taking of that property.

A word may be said here in regard to that class of property known as a franchise. As practically all our common carriers are corporations, it may be that some have expressly inserted in their charters the right to mine such a product as coal, and to transport it to market after it is mined. Such a right, however, is a right conferred by the state creating the corporation. It can extend no

further — even if it can extend as far — than to confer on the corporation any right which a natural person might possess of carrying on at one time the business of a common carrier and the business of a producer. Whether the state having conferred on a corporation the right to be a common carrier, and also the right to be a producer, can thereafter expressly or practically prohibit the corporation from engaging in the producing business, in view of the constitutional provision that no state shall impair the obligation of contracts, need not be discussed. It is evident that the state has no right to confer on a corporation of its own creation a right to engage in the business of an interstate carrier except subject to those rules which the federal government may lawfully make to regulate all natural persons being interstate common carriers. As affecting, therefore, the property of the carrier which is devoted to its producing business, or as affecting any franchises conferred on the carrier by the state of its creation, the Act does not, in any possible view, take such tangible property or such franchises.

Let us now turn to the clause requiring due process of law. The property devoted to production may be coal lands. These lands may have been possessed by the carrier at the time of the passage of the Act, or they may have been purchased since. As applied to the second case, the Commodity Clause is evidently not obnoxious to the requirement of due process. The requirement of due process, as we have seen, does not prevent the regulation of a common carrier. At least it has been decided that it does not prevent those regulations which are fairly designed, as in this case, to prevent a condition tending to interfere with the performance by the carrier of its public duties. Where the carrier has acquired property subsequent to the passage of the Act, the property has been acquired with the knowledge that Congress intended, after May first of this year, to make it unlawful for the carrier to transport the property to market. Having acquired the property subject to the incident of non-transportability, it cannot complain that it is deprived of a right of property if Congress refuses to suspend this incident.

On the other hand, the case at least presents other features if the property which the law prohibits the carrier from transporting was acquired at the time when it was perfectly lawful to transport it. Take, for instance, a railroad company owning coal lands in June, 1906. If such a company goes out of business as a common carrier, unless it secures the sanction of the state legislature to a lease

of its franchises, it forfeits its charter. On the other hand, the coal in its mines is useless unless transported to market, and it may well be that the only road by which the coal can be transported is its own road. In such a case the Act practically forces the railway company to sell or otherwise dispose of its coal lands. In the present state of our constitutional law in regard to deprivation of use of property and the requirement that no one shall be deprived of his property without due process of law, it would be a bold prophet who would assert that any act which practically rendered property useless, or required its sale at ruinous prices, would be constitutional or unconstitutional, where the act was passed, not in the exercise of a police power, but merely in the exercise of the power to regulate common carriers. The Act which we are discussing, however, did not go suddenly into effect. While after May first it prevents the transportation of coal mined by the carrier transporting it, it gave ample time to all carriers to transport to market all the coal which they had already mined at the time of the passage of the Act. While it doubtless does practically require many railroads interested directly or indirectly in coal lands to sell or otherwise dispose of such lands, it did not require this to be done suddenly. On the contrary, it allowed the railroads nearly two years to dispose of their coal properties in one way or another. And the fact that our common carriers are corporations in one respect renders it less likely that the time allowance is unreasonably short. If the common carrier, being also a producer, was a single individual, there would be nothing left for him to do but sell the property devoted to the business of production if he desired to continue his business as a common carrier. But our common carriers being corporations having stockholders, an actual sale of the property employed in the producing business is not necessary. All that is necessary is to distribute to the stockholders *pro rata* the shares of a new company formed to take over the mining or manufacturing business of the corporation. On the other hand, it must be remembered that in the case of many corporations the very magnitude of the property to be disposed of and the number and variety of the interests to be consulted, if they do not necessarily increase the legal difficulties, do increase the practical difficulties connected with a profitable disposition of that property which the Act, when its time limit expires, may render practically useless in the hands of the carrier. As applied to some companies, therefore, the Act, even in view of the time allowance, may be considered

unreasonable. But the burden would appear to be on each carrier to prove that as applied to it the Act is unreasonable. On its face the Act is not an arbitrary act.

There is, however, one case, which it is at least possible to imagine, where the carrier is not merely in a position in which it finds it difficult to dispose of its coal or other producing properties, but where it is legally impossible for it to do so. Our entire interstate railways are operated by companies deriving their charters from the states. As a result the relation of the stockholders *inter se* and the relation of the companies to their creditors, are determined by state, not federal, law. It is entirely possible that a railroad company owns property, practically useless after May first of this year, which property it cannot dispose of, because any disposition would be contrary to the law of the state of its incorporation. Suppose, for instance, a railroad company owning coal land prior to the passage of the Act placed a blanket mortgage on its property — railroad property and coal property — to secure its bonds, and suppose further that one of the clauses of the mortgage deprives the company of the power to sell or otherwise part with any of the property covered by the mortgage, and requires the company to operate its coal property in connection with its railroad property. The way in which a case of this general character is usually put is to suppose that a sale of any of the property covered by the mortgage can only be made with the consent of the trustee of the mortgage, and that the trustee has refused this consent. This, however, does not necessarily inflict a hardship on the company. As the company, in view of the Act, cannot use its coal lands, it may fairly be considered to be the duty of the trustee to consent to a disposition of the coal property, and, if he arbitrarily refuses this consent, his refusal may perhaps be overcome by proceedings in chancery. As applied, however, to a case where the trustee of the mortgage has no power to give consent to a sale of any of the property covered by the mortgage, does the Commodity Clause deprive the railroad of its coal property without due process of law? The hardship on the company is manifest. And it will be noted that the state, without the permission of the bondholders, cannot relieve the company by conferring on it a power to dispose of the coal lands contrary to the terms of the mortgage. A state statute attempting to do this would impair the contract between the bondholders and the company, and would therefore be contrary to the Constitution of the United States. Under the supposed facts, when the mortgage was made, the non-action of Con-

gress made the stipulation in regard to the combined operation of the coal lands and the railroad, and the clause in regard to the non-disposition of the coal lands, a sound business arrangement. On the other hand, the power of Congress over interstate commerce carriers existed at the time of the execution of the contract, and all the business arrangements of the carrier were made with full knowledge of that power. To ask Congress to take the coal lands by eminent domain and pay for them would be impossible. Congress, if it exercises the right of eminent domain, must do so for some constitutional purpose. It has no power to acquire property by eminent domain merely for the purpose of re-selling it. Again, to ask Congress to pay for the damage done would be absurd. By what rule could the damage be measured? Under the facts supposed there is damage only so long as the bondholders insist on the clause in their contract with the company which prohibits the company from disposing of its property. Therefore we may put the constitutional question raised by the supposed case thus: Does the clause prohibiting Congress from passing any law depriving a person of property without due process of law enable a common carrier, which by contract has deprived itself of the ordinary power of control over its property, to use this contract as a club to prevent Congress applying to it a law regulating interstate common carriers? As thus put, the question would appear to be capable of only one answer, even though it may be admitted that the power we are talking about—the power to regulate common carriers—is not so essential a power as the police power. Are the powers of government to govern capable of being frittered away by the private contracts of individuals? The words “due process of law” have never been held to have any such result. The government of the United States, unlike the government of the states, can impair private contracts. But even if this were not so, the Commodity Clause, as applied to the extreme case supposed, does not impair the obligation of the contract between the bondholders and the company. The supposition that the Act as applied to the case might deprive the company of its coal lands without due process of law is based on the assumption that the Act has no effect on the stipulations contained in the mortgage. Those who by contract deprive themselves of control of their property do so knowing that changing conditions may make them anxious to exercise those powers which they surrender. Does a government make an implied promise never to act merely because it has not acted? One of the conditions which every common carrier knows may change

is the statute law regulating the exercise of its public functions. It is fundamental that the plea of laches is not good against the public. Even if it were, it might be questioned whether the mere non-exercise of a power of government could ever amount to laches.

All this from a legal and constitutional point of view may be fairly considered to be beyond reasonable doubt. Yet it may not be improper in this place to point out that the case supposed, though unlikely to occur, is not impossible; and that if it does occur it is a case in which the resulting hardship on the carrier would be very real. Of course, this hardship may be exaggerated. The bondholders in the case supposed, seeing the inability of the railroad to profitably utilize its coal land, would naturally finally consent to a sale. But while arrangements are going forward the real loss to the carrier would be considerable. The hardship occurs because the carrier is subject to two jurisdictions, one federal, the other state. If our interstate carriers were incorporated under federal law, these unexpected hardships would be far less likely to occur. The mere possibility of the case which we have supposed would seem to indicate that, under the peculiarities of our federal system, the only way to avoid unexpected but very real injustice to our interstate common carriers, now that the people of the United States have apparently determined to place such carriers under strict federal control, is to provide for the federal incorporation of all companies doing an interstate transportation business.¹⁸

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¹⁸ Perhaps our subject should not be dismissed without a word in regard to that part of the Commodity Clause which excepts from its prohibition "timber and the manufactured products thereof." Is there any possibility that this exception makes the Act class legislation, admitting that under the requirement of the Fifth Amendment the words "due process of law" prohibit Congress from enacting class legislation? When an act is attacked as unconstitutional on the ground that it is class legislation, the test of constitutionality is the reasonableness of the classification found in the act. The Commodity Clause affects all common carriers by rail. That regulation of interstate commerce confined to common carriers by rail is not class legislation, may be admitted without comment. Again, the Act applies, not to one commodity excepting all others, but to all commodities excepting timber and its manufactured products. One reason for the exception may be suggested. To encourage the building of railroads, the national government has granted to railroads in the past large tracts of land. To preserve to these railroads the right to transport to market the chief product of these lands would appear to be within the constitutional power of Congress. Such an exception as that embodied in the Act may therefore represent a natural sense of consistency and fairness. As the exception, therefore, is based on a rational ground, which is apart from any desire to favor one class, the act would appear to be free from the taint of class legislation.

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EXEMPTIONS OF CHARITIES FROM TAXATION. — The state as *parens patriæ*, having the general superintendence of all charities, has long patronized them by granting exemptions from taxation.¹ And, if the Dartmouth College Case had not started the custom of regarding grants of privileges as contracts, the argument for allowing the ancient immunities would still be a sufficient explanation and justification of exemptions of charities today; that is, that their purposes redound to the good of the state. From this simple standpoint inquiries as to the presence of consideration or the contractual nature of exemptions, as well as artificial and strained constructions of constitutional and statutory exemptions, would be pointless. For the original exemptions would not be obligations, but favors of the state, and, of course, repealable. In view of possible future reactionary legislatures, repealable charters, though construed down to a minimum, are, it is clear, less desirable than irrevocable charters. But special privileges of exemption should not depend on the sanction of ancient legislatures, mistrusting the future and attempting to deprive it of its prerogatives. Nor has this right, though generally allowed, been adequately justified.² A remarkable fact with regard to its very foundation is that at the time of the grant of the Dartmouth College Charter, the king was legally incapable of granting an irrevocable charter.³

That the states can make irrevocable contracts of exemption was established by the United States Supreme Court in the face of considerable opposition.⁴ And courts generally are subtle in escaping binding obligations,

¹ See 1 Pollock & Maitland, *Hist. of Eng. Law*, 2 ed., 575.

² See *Wash. Univ. v. Rouse*, 8 Wall. (U. S.) 439, 441.

³ See 6 HARV. L. REV. 161, 179.

⁴ 1 Hare, *Const. L.*, 604-605.

holding that to act in reliance upon a general exemption statute by making large expenditures, even at the invitation of the state, is not a contract.⁵ For the statute is regarded as a mere allowance of a bounty, not as an offer to a unilateral contract. The deliberate intention of the state to contract, clearly manifested, is rightly made the test.⁶ In charters, grants of exemptions are generally held to be contracts. Acceptance,⁷ the charitable purposes of incorporation,⁸ the gift of property to public uses,⁹ etc., are considered as sufficient consideration. In interpreting the meaning and extent of these contract exemptions or of constitutional and statutory provisions granting repealable exemptions, some courts, laboring to minimize the effects of the Dartmouth College Doctrine, by their strict construction defeat the legislative and popular intention. But with reference to the exemption of charitable or educational institutions, there is neither reason nor necessity for an artificial construction of phrases well understood in common usage.¹⁰ When, therefore, the exemption applies to "the college estate," "the land held for the uses and purposes," "property belonging or appertaining to," or "so long as said land belongs to an incorporated institution of learning," the charitable or educational institution should not be taxed when it leases portions of its lands, devoting the rents to its general purposes.¹¹ Nor should it be taxed when it is lessee instead of lessor.¹² Should its lessee be taxed? There is a supporting analogy when the reversion is in the state.¹³ And accordingly in a recent case where the reversion owned by a university was exempt, the United States Supreme Court held that the interest of the lessee is taxable. *Fetton v. University of the South*, 208 U. S. 489. There was no attempt made to distinguish between taxing the term and taxing the lessee's improvements: taxation of the latter seems unobjectionable.¹⁴ But as the case stands its economic effect is to diminish the rental value of the lands by the amount of the tax assessed on the term. By the court's interpretation, therefore, the state has conferred the exemption only to destroy it by indirection.

STATE TAXATION ON INTERSTATE COMMERCE. — An important limitation on the taxing power of a state is that provision in the Constitution which gives to the federal government the regulation of interstate commerce. Though a tax in any form may affect such commerce, a sharp distinction is taken between taxes on property and taxes on privileges. The former, in general, have been upheld when no discrimination is made against interstate commerce and when they are not oppressive. Nor does it matter whether the tax is upon the agencies or upon the subject of interstate commerce.

⁵ *East Saginaw Mfg. Co. v. City*, 19 Mich. 259; *Salt Co. v. East Saginaw*, 13 Wall. (U. S.) 373. But see *Gonzales v. Sullivan*, 16 Fla. 791.

⁶ *Newton v. Commissioners*, 100 U. S. 548.

⁷ See *Grand Lodge v. New Orleans*, 166 U. S. 143.

⁸ *Home of the Friendless v. Rouse*, 8 Wall. (U. S.) 430.

⁹ *People v. Gass*, 104 N. Y. Supp. 643.

¹⁰ *Chicago Theological Sem. v. People*, 193 Ill. 619; *Fitterer v. Crawford*, 157 Mo. 51.

¹¹ *Brown Univ. v. Granger*, 19 R. I. 704; *People v. Dohling*, 6 N. Y. App. Div. 86; *Y. M. C. A. v. Keene*, 70 N. H. 223; *Univ. of the South v. Skidmore*, 87 Tenn. 155.

¹² *Scott v. Society*, 59 Neb. 571; *Humphries v. Little Sisters*, 29 Oh. St. 201.

¹³ *Ex parte Gaines*, 56 Ark. 227; *State v. Tucker*, 38 Neb. 56; *State, etc., Co. v. Haight*, 36 N. J. L. 471. Cf. *Elder v. Wood*, 208 U. S. 226.

¹⁴ *San Francisco v. McGinn*, 67 Cal. 110; *Parker v. Redfield*, 10 Conn. 490.

Thus a tax is valid when laid on goods brought into the state for sale, though still in the original package,¹ on the proceeds of such sales,² on cars engaged in interstate commerce, even though temporarily within the state,³ and on the gross receipts of a railroad when in the form of a property tax and in lieu of other taxes upon the same property.⁴ But if the tax is in substance a privilege tax it is generally invalid. An apparent exception is where the tax is for the purpose of regulation as an exercise of the police power rather than for revenue. Within this class come inspection taxes,⁵ and license taxes on peddlers.⁶ The extent to which such regulation may be carried, however, is a question upon which the cases are in hopeless conflict. But if the tax is a privilege tax for the purposes of revenue, it is invalid, and the court will look to the substance of the tax no matter what may be its form. Thus a uniform line of cases has declared license taxes on salesmen inapplicable to those soliciting orders for interstate business.⁷ Accordingly a federal circuit court has recently decided that where a New York company delivered goods in a New Jersey town in its own wagons kept there for the purpose, such wagons were not subject to a license tax imposed on all wagons used for the transportation of merchandise, since they were employed in interstate commerce. *Simpson-Crawford Co. v. Borough of Atlantic Highlands*, 158 Fed. 372 (Circ. Ct., D. N. J.). It is clear that the wagons would have been taxable as property, and it is submitted that the distinction between a property and a privilege tax is an unfortunate one. When the tax is solely upon the privilege of conducting an interstate business, or when, though general in terms, it applies to a business that in its nature can only be of an interstate character, it would seem clearly unconstitutional. But when, as in the present case, the tax is laid without discrimination on all who engage in a certain business, it is difficult to see any reason upon which to support the exemption of those who engage in an interstate business of that character from their fair share of the burden of taxation. Moreover it is doubtful whether the Commerce Clause was ever intended to thus limit the states in the exercise of the sovereign power of taxation. Not only would a uniform rule be just, but it would also be welcome because it would result in doing away to a large extent with the technical distinctions of the doctrine of the original package as applied to excise taxes. But though the recent decisions of the United States Supreme Court have maintained the principle of uniformity with regard to property taxes, they have refused to apply it with regard to privilege taxes, and the present case, if appealed, will doubtless be affirmed.

THE LIABILITY OF MARRIED WOMEN ON CONTRACTS OF SURETYSHIP. — On its adoption in some of the United States, the English chancery's conception of a married woman's separate estate — that to the extent of such estate she is like a single woman¹ — was changed somewhat, and the

¹ *Hinson v. Lott*, 8 Wall. (U. S.) 148.

² *Woodruff v. Parham*, *Ibid.* 123.

³ *Pullman's Co. v. Pennsylvania*, 141 U. S. 18. See 20 HARV. L. REV. 138.

⁴ *Maine v. Grand Trunk R. R. Co.*, 142 U. S. 217. See 20 HARV. L. REV. 503.

⁵ *Neilson v. Garza*, 2 Woods (U. S. C. C.) 287.

⁶ *Emert v. Missouri*, 156 U. S. 296.

⁷ *Caldwell v. North Carolina*, 187 U. S. 622; *Rearick v. Pennsylvania*, 203 U. S. 507.

¹ *Hulme v. Tenant*, 1 Bro. Ch. 16. See *Johnson v. Gallagher*, 3 De G. F. & J. 494, 519.

separate fund was administered not as if she were completely emancipated in regard to it, but as if she were a ward of the court and the fund existed only for her actual benefit. Consequently it was early laid down that she was not liable on a contract of suretyship for her husband.³ Some states, however, hold her liable in accord with the view prevailing in England.⁴

The first statutes in regard to married women, which as a general rule merely gave to her equitable separate property an existence at law,⁵ were not held to alter her obligations in equity, and the same conflict continued as to her liability on contracts of suretyship.⁶ Moreover statutes providing that she could contract "in reference to her separate property" were usually held not to change the extent of her existing liability in equity but to create similar rights on the legal side,⁷ the same conflict in regard to contracts of suretyship persisting.⁸ A recent Idaho case has followed the American rule, holding that a married woman cannot be liable at law as surety for a third person out of her legal separate estate under a statute permitting her to contract with reference thereto as if unmarried. *Bank of Commerce v. Baldwin*, 93 Pac. 504. The court sanctioned the view that she would be liable on contracts only when they were for her benefit. Between the extremes of these cases there stands an intermediate rule in many states, holding her liable on contracts in which she expressly binds her separate property as well as on contracts for her benefit. When merely a surety, therefore, she is liable if such a clause be inserted, either at law⁹ or in equity,¹⁰ depending on the statutes. This view has been criticized adversely, however, on the ground that it merely adds to the forms by which she may bind herself, with no commensurate increase of protection.¹¹ Other courts have made the question wholly one of actual intent, though her intention would rarely be other than to be bound in some way, and this must necessarily be out of her separate property.¹² The same conflict of opinion has also manifested itself in recent legislation. Some states have passed statutes making married women liable on all contracts, thus including those of suretyship.¹³ Some deny her the capacity to be surety for her husband,¹⁴ or to be surety in general,¹⁵ and others merely give her a defense, and hold that she may under certain circumstances be estopped to assert coverture.¹⁶

Although the cases differ very greatly in detail as to contracts of suretyship not governed by express statute, the court's decision is usually made

³ *Ewing v. Smith*, 3 Desaus. (S. C.) 417.

⁴ *Heatley v. Thomas*, 15 Ves. 596; *Morell v. Cowan*, 6 Ch. D. 166, reversed on another point, 7 Ch. D. 151; *Bell v. Kellar*, 13 B. Mon. (Ky.) 381; *Frank v. Lilienfeld*, 33 Grat. (Va.) 377.

⁵ See *Pippen v. Wesson*, 74 N. C. 437, 443; *Perkins v. Elliott*, 23 N. J. Eq. 526, 533.

⁶ *Hershizer v. Florence*, 39 Oh. St. 516 (holding her liable). Cf. *Davies v. Jenkins*, 6 Ch. D. 728. *Contra*, *Perkins v. Elliott*, *supra*.

⁷ See *Woolsey v. Brown*, 74 N. Y. 82.

⁸ *Deering v. Boyle*, 8 Kan. 525; *Williamson v. Cline*, 40 W. Va. 194. *Contra*, *Ritter v. Bruss*, 116 Wis. 55; *Gwynn v. Gwynn*, 31 S. C. 482.

⁹ See *Saratoga County Bank v. Pruyn*, 90 N. Y. 250.

¹⁰ *Webster v. Helm*, 93 Tenn. 322. See *Yale v. Dederer*, 22 N. Y. 450.

¹¹ See *Todd v. Lee*, 15 Wis. 365, 372. But see *Nunn's Adm. v. Givhan's Adm.*, 45 Ala. 370, 375.

¹² *Smith v. Bond*, 56 Neb. 529.

¹³ *Major v. Holmes*, 124 Mass. 108; *Mayo v. Hutchinson*, 57 Me. 546.

¹⁴ *Farmington Nat'l Bank v. Buzzell*, 60 N. H. 189.

¹⁵ *Seigman v. Streeter*, 64 N. J. L. 169.

¹⁶ *Perkins v. Rowland*, 69 Ga. 661.

to turn on the meaning of the ambiguous phrase "in reference to her separate property" — a source of endless confusion. The difference in the cases, however technically expressed, really seems at bottom to rest on the recognition of the need, growing with changing conditions, of allowing married women greater capacity to engage in business, counteracted by the belief that they are likely to contract imprudently. As time goes on, however, the latter as an actual influence must decrease in importance. Therefore the view which holds her separate property liable on contracts of suretyship, even without the statute giving her general power to contract as if unmarried, seems the better one. It certainly is more practicable.

CONSTITUTIONAL PROVISIONS AGAINST COMPULSORY SELF-INCRIMINATION. The present common law privilege against self-incrimination may be traced to the protest against the procedure in the Star Chamber. That protest had gone no further than to insist that men should not be arraigned upon mere suspicion of crime and subjected, without formal charge and under oath, to interrogation directed to procure disclosure of their offenses. At this time prosecutions for political and religious offenses were exceptionally prominent even in the common law courts. The original basis of the objection to the inquisitorial procedure of the ecclesiastical courts and the Star Chamber seems to have been lost, and the courts of common law, before which no man could be tried without formal charge of a specific offense, created a privilege against self-incrimination.¹ This rule, protective of crime, has been so widely extended as almost, if not quite, to excuse either a witness or a party in any action, civil or criminal, from being compelled to testify or to do any other act which may even tend to show his guilt.² The framers of the Fifth Amendment, directly inspired it seems by an opposition then being waged against the inquisitorial procedure of the French courts,³ provided that "no person shall be compelled in any criminal case to be a witness against himself." Similar prohibitions have been made in the constitutions of nearly all the states.

In framing rules of law, as for example in creating or extending the common law privilege against self-incrimination, courts, as well as legislatures, may with propriety be influenced by broad concepts of the scope of constitutional protection to personal liberty. But the true limits of such constitutional provisions are found only when the question arises as to whether or not the enactment of a coördinate department of government or a rule established by the courts exceeds the constitutional limitation upon legislative power. Here it must seem that a reasonable interpretation of the letter of the prohibitory clause can alone be the standard of judgment.⁴ Though only a few types of statutes relating to the production of evidence have been submitted to this test, it appears to be agreed that the constitutional protection, like the common law privilege, extends to witnesses in criminal actions who are not parties defendant.⁵ The prohibition is also held to protect parties and witnesses from statutory commands to produce

¹ See 3 Wig., Ev., 3069; 15 HARV. L. REV. 610.

² Cf. *Evans v. The State*, 106 Ga. 519.

³ See 3 Wig., Ev., 3090, n. 112.

⁴ Cf. Thayer, *Legal Essays*, 1; 7 HARV. L. REV. 129.

⁵ *Counselman v. Hitchcock*, 142 U. S. 547.

incriminating books and papers.⁶ However, even under the common law privilege, it has been held that a witness cannot refuse to obey a court order to bring his books to court, though upon the witness-stand he may refuse to disclose incriminating entries.⁷ It would seem that the constitutional provision should not invalidate similar statutory obligations.⁸ Apart from statutes it has been held that the constitutional provisions do not render the books or papers of a defendant inadmissible in evidence against him if secured otherwise than through the hand of the party whom they would tend to incriminate, even though procured by illegal means.⁹ Similarly, if the party's writing has become a public document, it is available to the prosecution without the assistance of the person whose crime may be exposed thereby, and the constitution furnishes him no shield.¹⁰

In a recent decision the Appellate Division of the Supreme Court of New York held violative of this constitutional provision a statute which imposed upon stockbrokers the duty of permitting inspection by state officials of their records of stock transactions, some of which might be criminal. *People v. Rearlton*, 39 N. Y. L. J. 171 (March, 1908). As those cases in which the books contain no incriminating entries are not distinguished, it seems that the decision must be founded on a confusion of constitutional provisions against compulsory self-incrimination and those against unreasonable search.¹¹ According to these tests of the limits of the constitutional provision it seems impossible to find here a "criminal case,"¹² and equally impossible to look upon the broker as a "witness."¹³ The statute does not seem to differ from those which impose upon liquor dealers a duty to make to public officials periodical reports of all sales; and, under similar constitutional limitations, such statutes have been sustained.¹⁴

CONSTITUTIONALITY OF PRIMARY ELECTION ACTS.—Recently many states have passed acts regulating primary elections either to choose party candidates,¹ or to elect delegates to a state nominating convention,² or to do both.³ In these acts small organizations which polled less than a certain proportion of the vote cast at the last election have been excluded. The constitutionality of such exclusion has lately been tested in Ohio, and the Supreme Court upheld the common provision of primary election laws, that members of parties polling ten per cent of the total vote cast at the last preceding election may vote for delegates to their state conventions at primary

⁶ *Boyd v. United States*, 116 U. S. 616.

⁷ *United States v. Collins*, 145 Fed. 709; *In re Lippman*, 15 Fed. Cas. 572.

⁸ *In re Consolidated Rendering Co.*, 66 Atl. 790 (Vt.).

⁹ *Adams v. New York*, 102 U. S. 585; *State v. Boomer*, 103 Ia. 106.

¹⁰ *People v. Coombs*, 158 N. Y. 532.

¹¹ As to the constitutional provisions against unreasonable search, see *Stanwood v. Green*, 22 Fed. Cas. 1077; *Shuman v. Fort Wayne*, 127 Ind. 109; *Hale v. Henkel*, 201 U. S. 43, 71, 72. But *cf. Boyd v. United States*, *supra*. The constitution of New York does not impose this limitation.

¹² But *cf. Counselman v. Hitchcock*, *supra*.

¹³ *Cf. People v. Gardner*, 144 N. Y. 119; *Adams v. New York*, *supra*, 597; *United States v. Collins*, *supra*.

¹⁴ *State v. Hanson*, 113 N. W. 371 (N. Dak.); *People v. Henwood*, 123 Mich. 317. *Cf. People v. Schneider*, 139 Mich. 673. But *cf. Matter of Peck*, 167 N. Y. 391.

¹ Ky. Stat., 3 ed., § 1550.

² B. and C., Stat. Ore., 1902, § 2880.

³ Oh. Ann. Rev. Stat., § 2916; Mass. Rev. Laws, c. 11, § 89.

elections paid for by the expenditure of public funds. *State v. Felton*, 84 N. E. 85. It is to be noted that the Ohio law is not mandatory, that candidates may still be nominated by a petition signed by a fixed number of voters, and that it is probable that informal primaries may still be held, though a convention chosen in this way will be given no legal recognition.⁴ The principal constitutional question raised by this and similar acts is whether the smaller parties are denied equal protection of the law.⁵ It will be noticed that the acts regulate the manner of nominating candidates or choosing delegates rather than qualify who may serve or who may act. It is true, however, that they give different-sized groups of voters different opportunities for putting their candidates' names on the official ballot, but this would not seem a fatal objection so long as no undue difficulty is imposed upon any one class. And regulation of some sort is essential in view of the fact that voters must necessarily be dealt with in masses; and since any system by which one or two men could nominate candidates would be unworkable, the prescribing of methods by which the larger and more cumbersome parties may make their true choice of candidates is a reasonable discrimination. This view is supported by decisions upholding the limitation of nomination by certificate from a party convention to a party which has polled a certain per cent of the votes cast at the last preceding election, relegating smaller parties to nomination by petition.⁶ Moreover, other states have held their primary election acts with similar provisions constitutional.⁷ Nor does the frequent provision of state constitutions that all elections shall be free and equal affect the result, since this clause merely refers to the protection of voters and to the value of each man's vote.⁸ In general, therefore, it would seem that classification of parties as to methods of nomination on the basis of size, if no more than reasonable regulation, does not violate the Fourteenth Amendment by denying equal protection of the law.

The Ohio court also held that the fact that these primaries were to be run at public expense did not render them unconstitutional. It was argued that public money was not being used for a public purpose, and hence taxation to support primaries was not due process of law. This argument seems untenable in view of the fact that the protection of the purity and expedition of elections, the purpose of these acts, is a fundamental function of state governments, unabridged by the constitution.⁹ When, however, the law steps outside the bounds of reasonable regulation and is merely conferring a privilege on certain parties at the expense of the general public, taxation to support it would, of course, cease to be due process of law.

APPLICATION OF PAYMENTS. — An inferior Canadian court has recently held that a payment the application of which was not directed by the

⁴ But *cf.* *Young v. Beckham*, 115 Ky. 246.

⁵ *Cooley*, Const. Lim., 7 ed., 899.

⁶ *State v. Poston*, 58 Oh. St. 620; *Corcoran v. Bennett*, 20 R. I. 6; *State v. Black*, 54 N. J. L. 446.

⁷ *State v. Jensen*, 86 Minn. 19; *Kenneweg v. County Comm.*, 102 Md. 119; *Ladd v. Holmes*, 40 Ore. 167; *State v. Drexel*, 105 N. W. 174 (Neb.). See *People v. Election Comm.*, 221 Ill. 9. But *cf.* *Britton v. Election Comm.*, 129 Cal. 337 (mandatory act).

⁸ See 23 Am. L. Rev. 728; *Ladd v. Holmes*, *supra*, 178.

⁹ *Kenneweg v. County Comm.*, *supra*.

debtor cannot be applied by the creditor to an outlawed debt in preference to an enforceable one. *Charles v. Stewart*, 11 Ont. Wkly. Rep. 421 (Ont., Fifth Div. Ct., Jan. 2, 1908). There is no reason to suppose that this is the law of the particular jurisdiction,¹ or of any common law tribunal.² According to the usual statement of the common law on this subject, the payment may be applied by the debtor, by the creditor, or by the court, in the order named.³ It is believed that the apparent confusion in the cases has arisen from the fact that the rule is thus briefly stated in terms of the legal result, with no indication of the course of reasoning by which such a result may be reached.

Payment comprises both the act of handing over money with the intent to pay and the act of receiving it with the intent to be paid. Where there is only one debt, the creditor's intention is as essential as the debtor's; hence, when there are several debts, the intention of neither party, if uncommunicated, should determine which debt is discharged.⁴ If, however, at the time of payment the debtor expressly or impliedly communicates his intention, the creditor, though actually dissenting, is nevertheless bound, since after accepting the money he will not be allowed to deny that he accepted the terms.⁵ Upon the same principle, if the debtor is silent, and the creditor communicates his intention at the time when he receives partial payment, which he could refuse without prejudice,⁶ the debtor is bound thereby.⁷ If neither declares his intention at the time of payment, each is presumed to make a continuing offer to assent to the subsequently expressed intention of the other, so that whichever first communicates his intention controls the application.⁸ This offer to assent will not be presumed in the case of unreasonable preferences, as when the creditor attempts to apply to illegal⁹ or unmatured debts;¹⁰ but it is probable that if at the time of payment the creditor communicated his unreasonable preference, and the debtor received the benefit of the creditor's acceptance of partial payment, the debtor would be bound. The test of reasonableness would also seem to furnish a rule, and reconcile the cases, as to the time at which the parties may apply. Accordingly, under ordinary circumstances, either party should be allowed to apply at any time, even after judgment,¹¹ provided the question of the particular application has not been litigated; but most courts hesitate to go to this length.¹² Another suggested result, for which no authority has been found, is that when the debtor pays the exact amount of one of two equal debts, the creditor's intention would

¹ See *Fraser v. Locie*, 10 Grant Ch. (U. C.) 207.

² *McDowell v. McDowell's Estate*, 75 Vt. 401. The principal case is in accord with the civil law. Civ. Code of La., Art. 2166.

³ See *Munger, Application of Payments*.

⁴ *Terhune v. Colton*, 12 N. J. Eq. 232; *Simson v. Ingham*, 2 B. & C. 65.

⁵ *Anon.*, Cro. Eliz. 68.

⁶ *Dixon v. Clark*, 5 C. B. 365.

⁷ See *Smith v. Wigley*, 3 M. & S. 174.

⁸ *Huffman v. Cauble*, 86 Ind. 591.

⁹ *Phillips v. Moses*, 65 Me. 70.

¹⁰ *Early v. Flannery*, 47 Vt. 253.

¹¹ *Marsh v. Oneida Central Bank*, 34 Barb. (N. Y.) 298. *Contra*, *Smith v. Betty*, [1903] 2 K. B. 317.

¹² The weight of American authority requires, incorrectly, it is believed, that the debtor apply at the time of payment, the creditor before action brought. See 2 Am. & Eng. Encyc., 2 ed., 444 ff. In England a creditor has been allowed to apply in the witness-box. *Seymour v. Pickett*, [1905] 1 K. B. 715.

never be operative unless actually assented to by the debtor, since the creditor would have no right to impose terms on his acceptance.

The principle of presumed assent finds full scope in the case where neither party has at any time communicated his intention; then that application is presumed to have been agreed upon to which it is most probable that the parties would have assented.¹³ Here certain rules of presumption have grown up, such as that the earliest items in a running account,¹⁴ or the most precariously secured debts,¹⁵ or the debts not yet barred,¹⁶ shall be preferred; but these presumptions should be rebuttable.¹⁷ For the essential distinction between the so-called common law and civil law rules is not that the one favors the creditor, the other the debtor, but that the civil law and other codes¹⁸ provide fixed rules of application, whereas at common law the application of a payment depends upon the agreement of the parties, actual or presumed. It follows that, strictly speaking, the court itself never applies a payment, but in all cases merely construes the acts of the parties.

APPROPRIATIONS TO REIMBURSE MUNICIPAL OFFICERS FOR EXPENSES INCURRED IN LITIGATION. — An appropriation to reimburse certain town officers who had made an arrest for the supposed violation of a local liquor law for their expenditures in a suit against them for false imprisonment, by which they were compelled to pay damages, was upheld in a recent Massachusetts case. *Leonard v. Inhabitants of Middleborough*, 84 N. E. 323. This reimbursement of municipal officers for expenses incurred in the supposed discharge of their duties may involve two considerations; for the validity of the expenditure of public money by a town or a city may be attacked on the ground that it is not within the corporate powers of the town or city as granted by the legislature,¹ or on the ground that it is not for a public purpose.²

The authorities are clear that it is within the power of a municipality to reimburse its officers for expenses incurred in litigation occasioned by lawful acts done in the course of duty.³ But the courts go further, and, as in the present case, sustain appropriations where the officers have committed a tort or other illegal act.⁴ Apparently the only limitations on this doctrine are that the officer must have incurred the liability while acting in good faith,⁵ and that the municipality must have a direct interest in the discharge of the particular duty.⁶ The courts adopt the theory that since a municipality may expend money for its own defense, it may make appropriations for its agent's defense,⁷ when the agent incurs a liability while acting for the

¹³ *The Martha*, 29 Fed. 708.

¹⁴ *Clayton's Case*, 1 Meriv. 585.

¹⁵ *Field v. Holland*, 6 Cranch (U. S.) 8. *Contra*, *Pond v. Harwood*, 139 N. Y. 111. Cf. *The Mecca*, [1897] A. C. 286.

¹⁶ *Estes v. Fry*, 166 Mo. 70. *Contra*, *Indian Contract Act*, § 61.

¹⁷ *The Mecca*, *supra*.

¹⁸ *Cal. Civ. Code*, § 1479; *Ga. Civ. Code*, § 3722.

¹ *Bloomfield v. Charter Oak Bank*, 121 U. S. 121.

² *Loan Ass'n v. Topeka*, 20 Wall. (U. S.) 655. See 21 HARV. L. REV. 277.

³ *Fuller v. Groton*, 11 Gray (Mass.) 340.

⁴ *Moorhead v. Murphy*, 94 Minn. 123.

⁵ *Cullen v. Carthage*, 103 Ind. 196.

⁶ *Vincent v. Inhab's of Nantucket*, 12 Cush. (Mass.) 103.

⁷ *Sherman v. Carr*, 8 R. I. 431.

municipality.⁸ But this theory merely indicates a method by which the municipality as principal may reimburse its agent if it is directly liable for his torts. And inasmuch as these cases of reimbursement arise only when the municipality is not directly liable, the appropriations can be supported only by regarding the municipality as capable of discharging certain moral obligations.⁹ On principle, it is submitted that such a power is not within the strict construction of municipal charters universally demanded by the courts.¹⁰

The further question, whether or not these reimbursements serve a public purpose by making officers more efficient in the performance of their duties, is usually overlooked by the courts. It may be argued that personal liability for all unauthorized acts will result in such an excess of caution on the part of public officials as to interfere with the proper performance of their duties. On the other hand, reimbursement may cause wasteful carelessness. But ordinarily the courts refuse to declare appropriations public when the immediate purpose is the promotion of individual interest, even though the public welfare is ultimately furthered.¹¹ Accordingly, reimbursement would seem to be in its nature a gratuity and within the limitation.¹² On this ground the courts have declared invalid a statute authorizing municipal officers to obtain reimbursement for successfully defending suits brought to remove them from office.¹³ Such cases may be distinguished in that suits to remove from office are brought for criminal misconduct in office and are in their nature penal. But the underlying principle is the same whether the reimbursement is for a civil or criminal prosecution. However, since courts hesitate to interfere with municipal appropriations and will go far to find a public purpose, and in view of the authorities supporting appropriations for reimbursement, though the validity of the purpose was not questioned, it is unlikely that in future such appropriations, at least in civil cases, will be declared invalid.

RECENT CASES.

BILLS AND NOTES — CHECKS — ACCEPTANCE BY RETENTION OF CHECK BY DRAWEE — The Negotiable Instruments Law of Pennsylvania provides that where a drawee to whom a bill is delivered for acceptance destroys it or refuses to return it within twenty-four hours or such other period as the holder may allow, he will be deemed to have accepted it. The plaintiff presented certain checks to the defendant bank, which retained possession of them for several days. There was no express demand by the plaintiff, nor refusal by the bank. *Held*, that the defendant is liable as acceptor. *Wisner v. First Nat'l Bank*, 68 Atl. 935 (Pa.).

A drawee ordinarily has twenty-four hours in which to examine the state of his accounts before he need act in any way. See *Bellasis v. Hester*, 1 Ld. Raym. 280, 281. The mere retention beyond that time of a check or bill of exchange offered for acceptance was not, under the law merchant, enough to constitute a

⁸ *Babbitt v. Selectmen of Savoy*, 3 Cush. (Mass.) 530.

⁹ *Trustees of Exempt Firemen's Fund v. Roome*, 93 N. Y. 313.

¹⁰ *Stetson v. Kempton*, 13 Mass. 271.

¹¹ *Lowell v. Boston*, 111 Mass. 454.

¹² *Mount v. State*, 90 Ind. 29.

¹³ *Matter of Chapman v. City of New York*, 168 N. Y. 80. *Contra*, *Laurence v. McAlvin*, 109 Mass. 311; *Hixon v. Sharon*, 190 Mass. 347.

constructive acceptance. *Overman v. Hoboken City Bank*, 31 N. J. L. 563. And several cases have reached the same result under the Negotiable Instruments Law. *Dickinson v. Marsh*, 57 Mo. App. 566. What acts beyond mere retention were necessary under the law merchant to constitute an acceptance was unsettled. The statute should be regarded as defining the kind of act required, and is usually interpreted as contemplating a tortious act in the nature of a conversion. *Matteson v. Moulton*, 11 Hun 268, aff'd 79 N. Y. 627. In the present case, however, the court maintains that presentation is itself a demand for acceptance or return, and that failure to comply with that demand constitutes an acceptance within the statute. But since a check need only be presented for payment and need not be presented for acceptance, its presentation is probably not a demand for acceptance. See *Westberg v. Chicago, etc., Co.*, 117 Wis. 589, 594.

BROKERS — STOCKS CARRIED ON MARGIN — NATURE OF TRANSACTION. — A broker carried stock on margin for the defendants, and, as was permissible under the agreement, pledged it for an amount greater than the defendants owed him. Within four months before his bankruptcy, he transferred assets to the pledgee, so that the defendants were able to redeem the stock on payment of their indebtedness. The broker's trustee in bankruptcy sued for the amount transferred, on the ground that the defendants had obtained a preference. *Held*, that the defendants are not liable, as they are pledgors of the stock and are not creditors within the meaning of the Bankruptcy Act of 1898, § 1 (9). *Richardson v. Shaw*, U. S. Sup. Ct., April 6, 1908.

For a discussion of the principles involved, see 19 HARV. L. REV. 529. *Cf.* also 15 *ibid.* 78.

CARRIERS — INJURY TO GOODS — INJURY CAUSED BY NON-NEGLIGENT ACT OF SHIPPER. — The plaintiff shipped a convict car on the defendant's railroad. A fire in a stove in the car, unknown to both parties, was burning at the time of the shipment. From this the car caught fire and was destroyed. Neither the plaintiff nor the defendant was guilty of any negligence. *Held*, that the plaintiff cannot recover. *Coweta County v. Central of Georgia Ry. Co.*, 60 S. E. 1018 (Ga.).

The rule was early laid down that a common carrier is liable for the loss of goods entrusted to it unless caused by an act of God or of the public enemy. *Coggs v. Bernard*, 2 Ld. Raym. 909. To these two exceptions may be added losses due to public authority, the inherent nature of the goods and the act of the shipper. 4 ELLIOTT, RAILROADS, § 1454. Interference by the shipper with the carrier in the method of performing its duty, relieves the carrier of its absolute liability. *Loveland v. Burke*, 120 Mass. 139. And the carrier is similarly relieved by a negligent or wrongful act of the shipper. *Rixford v. Smith*, 52 N. H. 355. But no case has been found in which the carrier is relieved because of the shipper's non-negligent act. The principal case may be supported, however, on the ground that the fire in the car amounted to an inherent defect. *Cf. Hudson v. Baxendale*, 2 H. & N. 575. The opposite result would probably have been reached if a fire started by the shipper in any other place had, without negligence on his part, spread to the railroad and consumed the goods.

CONSTITUTIONAL LAW — NATURE AND DEVELOPMENT OF CONSTITUTIONAL GOVERNMENT — STATE QUASI-SOVEREIGNTY. — A New Jersey statute provided that it should be unlawful to transport or carry through pipes or conduits the waters of any fresh-water stream or lake of New Jersey into any other state for use therein. The defendant corporation carried water of the Passaic River through pipes to New York. *Held*, that the statute is constitutional and that an injunction should be granted. *Hudson County Water Co. v. McCarter*, U. S. Sup. Ct., April 6, 1908.

The case is noteworthy because the decision is based not on the state's ownership of the riverbed nor on the actual injury suffered by this diversion, but on the ground that the state as quasi-sovereign, *parens patriæ*, can protect

natural resources for the benefit of its citizens, or of that portion interested. This doctrine was the justification for allowing the state to appear as plaintiff in the recent cases for the protection of a state's resources from acts outside. *Georgia v. Tenn. Copper Co.*, 206 U. S. 230; see 21 HARV. L. REV. 132. How far a state may protect its resources from acts within its territory is still unsettled. Statutes similar to the one in the case, providing the terms on which gas, oil, and animals *ferae naturae* can be reduced to possession and so become private property, have been upheld. Thus, statutes preventing the killing of game to be taken outside the state and preventing the acquisition of gas for wasteful use are constitutional. *Geer v. Connecticut*, 161 U. S. 519; *Ohio Oil Co. v. Indiana*, 177 U. S. 190; but cf. *Manufacturers, etc., Co. v. Ind., etc., Co.*, 155 Ind. 545. But when such resources become private property by being reduced to possession, it would seem that the ordinary rules of the rights of property owners exist. See FREUND, POLICE POWER, §§ 422-3.

CONSTITUTIONAL LAW — PERSONAL RIGHTS — PEONAGE. — A South Carolina statute provided that any farm laborer working under a contract who should receive advances and thereafter wilfully fail to perform the contract, should be guilty of a misdemeanor punishable by imprisonment. *Held*, that the statute is invalid, since it violates (1) the state constitution prohibiting imprisonment for debt; (2) the Thirteenth Amendment prohibiting involuntary servitude except as punishment for a crime; (3) the Fourteenth Amendment prohibiting the denial of equal protection of the laws; and (4) 14 Stat. at L. 546, abolishing peonage. Six justices dissented. *Ex parte Holman*, 60 S. E. 19 (S. C.).

For a discussion of the principles involved, see 17 HARV. L. REV. 121.

COURTS — JURISDICTION ON HOLIDAYS. — A statute prohibited certain judicial proceedings on holidays. Such proceedings were had in violation of the statute, but the relator failed to object. Later a judgment, based in part upon such proceedings, was entered on a judicial day. *Held*, that such judgment will not be set aside. *State ex rel. Walter v Superior Court of Whitman County*, 94 Pac. 665 (Wash.).

It is generally held that when a statute creates a legal holiday but does not expressly prohibit judicial proceedings, such proceedings, held on that day, will not be void if no objection is taken at the time, though it is probable that if objection is raised at the proper time the court cannot compel the parties to proceed. *State v. Moore*, 104 N. C. 743. But where the statute expressly forbids the holding of court on a certain day, such day becomes *dies non juridicus*, and any proceedings held in violation of the prohibition will be void, regardless of whether or not objection was raised at the time, since the court is without jurisdiction. *Davidson v. Munsey*, 27 Utah 87. The present case seems to fall within the latter rule, and, since the court was without jurisdiction, failure to object at the time should have been immaterial, for a jurisdictional objection may be raised at any stage of proceedings. *Fowler v. Eddy*, 110 Pa. St. 117.

COVENANTS OF TITLE — COVENANTS OF SEISIN AND WARRANTY — BREACH BY POSSESSION ADVERSE TO GRANTOR. — The defendant conveyed land to the plaintiff with covenants of seisin and warranty. Subsequently the defendant sued A, who was in possession in ejectment. A set up possession for the statutory period and prevailed. *Held*, that there is a breach of both covenants. *Larson v. Goettl*, 114 N. W. 840 (Minn.).

When a possession adverse to the grantor has ripened into an indefeasible right at the time a conveyance with a covenant of seisin is made, the covenant is undoubtedly broken. *Wilson v. Forbes*, 2 Dev. (N. C.) 30. On principle it would seem that any possession adverse to the grantor should constitute a breach. See *Thomas v. Perry*, 1 Pet. (U. S. C. C.) 49. But there is some authority that a mere tortious possession does not come within the covenant. *Ferritt v. Weare*, 3 Price 575. In the present case, however, it does not appear whether or not, at the time of the grant, the adverse possession had continued for the statutory period. With regard to covenants of warranty, a distinction is un-

doubtedly made between an adverse possessor who holds under a paramount title and one who does not. If his right is complete at the time of the grant, it is generally held that this constitutes sufficient eviction to support an action for breach of the covenant. *Moore v. Vail*, 17 Ill. 185. But if the grantor has the paramount title a mere tortious adverse possession is not a breach of warranty. *Noonan v. Lee*, 2 Black (U. S.) 499.

DAMAGES — MEASURE OF DAMAGES — TROVER FOR CONVERSION OF GOODS IN TRANSIT. — The defendant, at Buffalo, seized certain horses shipped by the plaintiff from Chicago to Liverpool. The plaintiff brought trover for the conversion. *Held*, that the plaintiff may recover the market value of the horses at Liverpool less the cost of carriage and of effecting a sale there. *Wallingford v. Kaiser*, 191 N. Y. 392.

The general measure of damages in trover is the market value of the property at the time and place of conversion, with interest. *Spicer v. Waters*, 65 Barb. (N. Y.) 227. Where, however, a common carrier converts goods delivered for transportation, the universal rule is that the carrier is liable for the value of the goods at the place of destination. *Sturgess v. Bissell*, 46 N. Y. 462. But this rule of liability is based on the carrier's breach of either his common law or his contractual duty to deliver, and not on the mere conversion. To allow the plaintiff to recover in trover for his loss of profits is to allow him consequential damages, since his only direct loss is the loss of his property at the time and place of conversion. In this country it seems to be generally held that consequential damages are not recoverable in actions of trover. *Seymour v. Ives*, 46 Conn. 109. And the same is true in England unless special damage is alleged and proved. *Bodley v. Reynolds*, 8 Q. B. 779.

DEDICATION — RESTRICTIONS ON DEDICATION — LIMITATIONS IN AN IMPLIED DEDICATION. — A steam railroad constructed a crossing over its right of way, which was owned in fee. After the public had used it as an ordinary street for several years the railroad sought to enjoin a street railroad from using the crossing. *Held*, that the railroad is not entitled to the injunction. *Michigan Central R. Co. v. Hammond, W. & E. C. Elec. Ry. Co.*, 83 N. E. 650 (Ind., App. Ct.).

The operation of a street railroad is an ordinary use of a public street and is not an additional burden on the easement. *Taggart v. Newport St. Ry. Co.*, 16 R. I. 668. When a steam railroad obtains a right of way across a public street, it does so subject to the easement of the general public to use the street and therefore cannot object to its tracks being crossed by those of a street railroad. *Chicago, etc., Ry. Co. v. Whiting*, 139 Ind. 297; *C., B. & Q. R. R. Co. v. West Chicago St. R. R. Co.*, 156 Ill. 255. In the present case the public obtained the street by the implied dedication of the railroad, and it was argued that the dedication was limited to the easement of a foot and carriage way. If such a restricted dedication were made by deed or writing, it might be sustained, although to allow such restrictions seems contrary to sound public policy. See 21 HARV. L. REV. 356. To go further, allowing the dedicator to impose limitations on the apparent scope of his dedication by showing his intent, would be confusing and unjustifiable. When, as in this case, the evidence shows that a highway has been dedicated, all the customary uses of a highway are proper. *South East, etc., Ry. Co. v. Evansville, etc., Ry. Co.*, 82 N. E. 765 (Ind.).

EASEMENTS — PRESCRIPTION — INTERRUPTION BY INCREASING BURDEN. — The defendant erected and operated a two-track elevated railroad for seventeen years. It then erected a third track between the two on the same supports, and maintained it for five years. The plaintiff, an abutting owner, sued for interference with his easements of light, air, and access. *Held*, that the defendant has not acquired a prescriptive right to maintain the original tracks. *Roosevelt v. N. Y. El. R. R. Co.*, 38 N. Y. L. J. 2515 (N. Y., Sup. Ct., March, 1908).

The fact that the defendant's charter contains a provision for compensation of abutting owners does not prevent its user from being adverse. *Lehigh Valley R. R. Co. v. McFarlan*, 43 N. J. L. 605. The whole question therefore is

whether the addition of the third track is an interruption of the user. The test is whether the old user is radically different from, or whether it is merely a divisible fraction of, the new. *A. B. N. Co. v. N. Y. El. R. R. Co.*, 129 N. Y. 252. Thus the deepening and enlarging of a drain is an interruption. *Cotton v. Pocasset Mfg. Co.*, 54 Mass. 429. But a mere increase in the amount of drainage is not. *Shaughnessey v. Leary*, 162 Mass. 108. Where an elevated cable road is changed into an electric road, and the supports are moved and strengthened, there is properly held to be an interruption in the user. *A. B. N. Co. v. N. Y. El. R. R. Co.*, *supra*. But in the principal case the old user remains a distinct and divisible part of the new. Therefore it would seem that the court is wrong in holding that the defendant acquired no prescriptive right to maintain the two tracks.

ELECTIONS — CONSTITUTIONALITY OF PRIMARY ELECTION ACTS. — An act provided that a political party which polled over ten per cent of the votes cast at the last preceding election might have primary elections at public expense to elect delegates to the state nominating convention or to choose party candidates for election. *Held*, that the act is constitutional. *State v. Fellon*, 84 N. E. 85 (Oh.). See NOTES, p. 622.

EQUITABLE CONVERSION — WHETHER SURPLUS PROCEEDS OF SALE OF LAND BY COURT DESCENDS AS REALTY OR PERSONALTY. — On A's death B became entitled to certain land. This land was subsequently sold by order of the court for the payment of the costs of settling the estate. After the sale B died intestate. *Held*, that the surplus resulting from the sale goes to B's heirs. *Burgess v. Booth*, 124 L. T. 503 (Eng., Ch. D., March, 1908).

When an intestate's land is sold for a particular purpose, the surplus undoubtedly goes to the heir. *Dixon v. Dawson*, 2 Sim. & St. 327. If the heir dies before the sale, the land of course, descends to his heir, who should also be entitled to the surplus. See 18 HARV. L. REV. 1, 4. But if the heir dies after the sale, the surplus, by the weight of authority, goes to his personal representative, since, the deceased not being the owner of realty at the time of his death, there is nothing to descend to the heir. *Graham v. Dickinson*, 3 Barb. (N. Y.) 169. The same principles, of course, apply when the title to the land passes by will. The present case relies upon a holding that a surplus from a mortgage foreclosure during the life of the mortgagor goes to his heir. *Scott v. Scott*, 9 L. R. Ir. 367. But by the better view the same distinction should be made in such cases. Thus it has been held that whether the heir or personal representative takes the surplus depends upon whether the mortgagor died before or after the foreclosure. *Wright v. Rose*, 2 Sim. & St. 323; see 18 HARV. L. REV. 1, 7. The present case therefore seems unsound on principle, and, further, there is direct English authority opposed to its conclusion. *Smith v. Claxton*, 4 Madd. 484.

FEDERAL COURTS — JURISDICTION BASED ON DIVERSITY OF CITIZENSHIP — WAIVER OF JURISDICTIONAL DEFECT. — The plaintiff sued the defendant in a court of a state in which neither was a resident. The defendant had the case removed to the United States circuit court on the ground of diversity of citizenship. There the plaintiff filed an amended petition. After several continuances entered into by both parties, the plaintiff moved to remand the case to the state court on the ground that neither party was a resident of the district. *Held*, that the plaintiff, by recognizing the jurisdiction of the court, waived objection thereto. *In re Moore*, U. S. Sup. Ct., April 20, 1908.

The constitutional requirement of diversity of citizenship as a ground of federal jurisdiction cannot be waived by the parties, and the court may of its own motion remand a case for want of jurisdiction. *Great Southern, etc., Co. v. Jones*, 177 U. S. 449. On the other hand it is well settled that the statutory requirement that a suit, originally instituted in a federal court and properly within federal jurisdiction, must be brought in the district of the residence of one of the parties, confers a personal privilege which may be waived. *Central Trust Co. v. McGeorge*, 151 U. S. 129. The similar requirement in case of the

removal of a suit from a state court to a federal court seems properly construed in the present case in the same way. A rather ambiguous dictum in a recent Supreme Court decision implied that under these facts jurisdiction could not be obtained by a circuit court even by consent of the parties. *In re Wisner*, 203 U. S. 449. Accordingly the decisions of several of the lower federal courts have reached that result. See *Yellow Aster, etc., Co. v. Crane Co.*, 150 Fed. 580. The dictum, however, was not universally accepted. *Proctor Coal Co. v. U. S. Fidelity, etc., Co.*, 158 Fed. 211.

HUSBAND AND WIFE — LIABILITIES OF HUSBAND AS TO THIRD PARTIES — EFFECT OF MARRIED WOMEN'S PROPERTY ACTS ON HUSBAND'S LIABILITY FOR TORTS OF WIFE. — A former act provided that in actions of tort against a husband and a wife for the tort of the wife, execution should first be levied on the lands of the wife. A later statute repealed this act, and provided that a wife might sue and be sued in all matters as if she were *sole*. *Held*, that this statute abolishes by implication the common law liability of the husband for the torts of his wife. *Schuler v. Henry*, 94 Pac. 360 (Colo., Sup. Ct.).

At common law a wife was liable for her torts. *Hall v. White*, 27 Conn. 488. But, as she was not *sui juris*, it was necessary to join her husband in order to have a proper party defendant. *Capel v. Powell*, 17 C. B. (N. S.) 744. Once joined, the law did not consider it unfair, in view of his control over the person and property of his wife, to subject his property to execution. BACON, ABR., *Baron & Feme, F.* Also, since a debtor's person could be taken on execution, a judgment against the wife as a *feme sole* so endangered the husband's legal right to her society without hearing him in defense, that he could bring error. *Haydon v. Miller*, 2 Rolle 53; *Hayward v. Williams*, Style 254, 280. But, since his liability arose only from the wife's legal disability, it ceased on her death. Previous statutes had abolished the husband's right over his wife's person and property and the right to take a debtor's person on execution. The present statute, by abolishing the last relics of the wife's disability, removed the necessity which caused the husband's liability. Though married women's property acts vary greatly and the decisions under them are consequently in great conflict, the modern tendency of the law as to married women seems to favor this result. *Martin v. Robson*, 65 Ill. 129.

HUSBAND AND WIFE — WIFE'S SEPARATE ESTATE — LIABILITY OF SEPARATE ESTATE ON CONTRACT OF SURETYSHIP. — A statute provided that married women might contract with reference to their legal separate property as if unmarried. The defendant, a married woman, signed a note as surety. *Held*, that she is not liable. *Bank of Commerce v. Baldwin*, 93 Pac 504 (Idaho). See NOTES, p. 619.

INSANE PERSONS — CONVEYANCES — HOW AVOIDED. — In an action of ejectment the defendants claimed title under a deed from the plaintiffs' ancestor to a *bona fide* purchaser. The plaintiffs offered evidence to show that the grantor was insane when he made the deed. The evidence was excluded on the ground that such deed can only be avoided in equity. *Held*, that the exclusion of this evidence was error. *Smith v. Ryan*, 191 N. Y. 452.

For a criticism of the decision in the lower court, see 20 HARV. L. REV. 419.

INSURANCE — AMOUNT OF RECOVERY — DESTRUCTION BY FIRE OF BUILDING CONDEMNED AS A NUISANCE. — The defendant corporation insured the plaintiff's building knowing, through its agent, that the city authorities had condemned the building as a nuisance. The authorities were on the point of tearing it down, when it was destroyed by fire. *Held*, that the plaintiff may recover full damages. *Irvin v. Westchester Fire Ins. Co.*, 109 N. Y. Supp. 612 (Sup. Ct.).

The court rightly found that the plaintiff had an insurable interest in the condemned building; for any interest in property the loss of which will occasion a pecuniary injury to the insured may be the subject of an insurance contract. *Riggs v. Commercial Mut. Ins. Co.*, 125 N. Y. 7. But the question is sug-

gested, whether the case is within the rule that where the insured premises are used for an unlawful purpose, an insurance contract covering them is void as against public policy. *Johnson v. Union, etc., Ins. Co.*, 127 Mass. 555. This rule is frequently applied where liquor is illegally sold on the insured premises, on the ground that the insurance encourages violations of the law. *Kelly v. Worcester Mut. Fire Ins. Co.*, 97 Mass. 284. In Michigan, Iowa, and Kansas, however, the rule is rejected on the ground that the insurance is too remotely connected with the illegal transactions. *De Graff v. Niagara Fire Ins. Co.*, 12 Mich. 124. In the present case it seems clear that maintaining the nuisance was too remote a consideration to avoid the contract within the rule. See *Loehner v. Home Mut. Ins. Co.*, 17 Mo. 247. But it is submitted that the proper indemnity for the loss would have been the actual value of the building as about to be torn down. See *Huckins v. People's Mut. Fire Ins. Co.*, 31 N. H. 238.

INTERSTATE COMMERCE — CONTROL BY STATES — PEDDLERS SUBJECT TO STATE LICENSE TAX. — The defendant was the agent of a foreign corporation which sold portraits on advance orders. The contract specified that a buyer was to have the privilege of purchasing a suitable frame at a low price at the time of the delivery of the portrait. The defendant was indicted for selling picture-frames without the license required by statute of peddlers. It was conceded that he could not be punished for delivering the pictures. *Held*, that the sale of the frames was intrastate commerce and the conviction proper. *Doxier v. State*, 46 So. 9 (Ala.).

If the business of selling frames had been carried on by a separate person who accompanied the picture-seller, the occupation would clearly be that of a peddler. As such it would be subject to state control. The courts avoid a conflict between the Commerce Clause and the state police power by saying that the frames have become part of the general property of the seller in the state and that no part of the sale itself involves an interstate transaction. *Emert v. Missouri*, 156 U. S. 296. And when the two occupations are carried on by the same man, the direct sales may properly be regulated. *Kehrer v. Stewart*, 197 U. S. 60. Upon the business of taking or filling orders it is settled that a license cannot be imposed. *Brennan v. Titusville*, 153 U. S. 289. The decisions opposed to the present case rest on the ground that selling frames is a mere incident to delivering the pictures. *Chicago Portrait Co. v. Macon*, 147 Fed. 967. But it is believed that the transactions are separable and that this part at least calls for police regulation. And though the authority on the direct question involved is divided, the present case has respectable support. *State v. Montgomery*, 92 Me. 433.

LIMITATION OF ACTIONS — ACCRUAL OF RIGHT — CONVEYANCE BEFORE MARRIAGE IN FRAUD OF DOWER. — Two days before his marriage, and without the knowledge of his prospective bride, one W. gratuitously conveyed lands to the defendants. *Held*, that it is against public policy to compel a wife, on peril of the bar of the statute of limitations, to institute an action in which her husband will be a defendant, and therefore the statute does not begin to run against the right of the wife until the death of the husband. *Wallace v. Wallace*, 114 N. W. 913 (Ia.).

The right of a husband to have set aside fraudulent antenuptial conveyances made by his wife was early established. See *Countess of Strathmore v. Bowes*, 1 Ves. Jr. 22. It appears to be settled in America that the wife has a similar right to attack antenuptial conveyances by the husband in so far as such transfers operate to deprive her of that inchoate dower interest which otherwise would have accrued to her upon marriage. *Chandler v. Hollingsworth*, 3 Del. Ch. 99; *Arnegaard v. Arnegaard*, 7 N. Dak. 475. It is evident, however, that the wife has only an equitable right to have a dower interest secured to her by one who holds a perfect legal title. Since such an equitable interest is always subject to extinction by a transfer of the legal title to a *bona fide* purchaser, the wife will not be adequately protected unless there be conceded to her a right to prosecute the claim at any time after marriage. *Babcock v. Babcock*, 53 How.

Pr. (N. Y.) 97; see *Waterhouse v. Waterhouse*, 206 Pa. St. 433. As the Iowa statute provides quite absolutely that such an action on the ground of fraud must be brought within five years after the cause accrues, the principle of the present case seems insupportable. IOWA CODE, §§ 3447, 3448, 3453.

MARRIAGE — CREATION OF THE RELATION — COMMON LAW MARRIAGE AS AFFECTING BIGAMY. — The defendant, having entered into a common law marriage, was later married to another woman. *Held*, that the common law marriage supports an indictment for bigamy. *State v. Thompson*, 68 Atl. 1068 (N. J., Sup. Ct.).

For a discussion of the principles involved, see 20 HARV. L. REV. 576.

MUNICIPAL CORPORATIONS — GOVERNMENTAL POWERS AND FUNCTIONS — TAX LEVIED TO REIMBURSE OFFICERS FOR EXPENSES OF PRIVATE LITIGATION. — A petition was brought to restrain the payment of money by a town to reimburse its officers, who had been subjected to suits for damages by reason of arrests made for violation of the liquor law. *Held*, that the town is impliedly authorized to appropriate money for this purpose. *Leonard v. Inhabitants of Middleborough*, 84 N. E. 323 (Mass.). See NOTES, p. 625.

NUISANCE — RECOVERY OF DAMAGES — RECOVERY BY ONE HAVING NO RIGHTS IN PROPERTY AFFECTED. — Through the negligence of the defendant the water supply used in the plaintiff's hospital became infected and the plaintiff paid damages to patients injured thereby. The plaintiff, who had neither proprietary interest in, nor license to use, the water, sued the defendant for reimbursement. *Held*, that the plaintiff can recover. *Fergusson v. Malvern Urban District Council*, 72 J. P. 101 (Eng., K. B. D., Jan. 1908).

The authorities are divided on the question whether the plaintiff, to maintain an action on the case for nuisance affecting property rights, must himself have a proprietary interest in the property. But since all admit that if one has such an interest he can recover for an injury to his health alone, it seems more logical to allow an action irrespective of the property rights of the plaintiff. *Fort Worth Ry. Co. v. Glenn*, 97 Tex. 586; *contra, Ellis v. Kansas City R. R. Co.*, 63 Mo. 131. Though the plaintiff here had no right to have the flow of water continued, yet he was wronging no one in using it. It is true that he has not suffered physically, but only financially. But a man has been held liable for damages suffered by loss of custom to a boarding-house caused by his introducing contagious disease. *Smith v. Baker*, 20 Fed. 709. It seems, then, that the present case is right; for the plaintiff acting legally has been greatly injured through the negligence of the defendant in causing the spread of a dangerous disease, and there appears to be no just ground for refusing relief.

PAYMENT — APPLICATION — APPLICATION OF PAYMENT BY CREDITOR TO DEBT BARRED BY STATUTE OF LIMITATIONS. — A creditor holding two claims against a debtor, one of which was barred by the statute of limitations, applied a payment to the barred claim. *Held*, that the payment must be considered to have been made on the enforceable claim. *Charles v. Stewart*, 11 Ont. Wkly. Rep. 421 (Ont., Fifth Div. Ct., Jan. 2, 1908). See NOTES, p. 623.

RESTRAINT OF TRADE — STATE ANTI-TRUST LEGISLATION — COMBINATION OF PUBLIC SERVICE COMPANIES. — The New York Stock Corporation Law provides that "no corporation shall combine with any corporation or person for the creation of a monopoly or the unlawful restraint of trade or for the prevention of competition in any necessity of life." Under the Code of Civil Procedure, § 1798, the attorney-general applied to the court for leave to bring an action against the Consolidated Gas Company which, for the purpose of securing a monopoly, had purchased a controlling interest in the other companies supplying gas and electric light to the city of New York. *Held*, that permission is denied. *In the Matter of the Application of the Attorney-General*, 39 N. Y. L. J. 19 (N. Y., App. Div., Feb. 1908).

The court reasoned that this consolidation did not constitute an illegal mo-

nopoly, since the company was a public service corporation and therefore could not arbitrarily regulate the production or the price of its product. The decision involves a comparatively new and important limitation on the force of anti-trust legislation. In the interpretation of the Sherman Act the courts have strictly forbidden the substitution of monopoly for competition whether by public service or by private corporations, and regardless of the effect of the monopoly upon prices or rates. *United States v. Freight Ass'n*, 166 U. S. 290; see *United States v. Swift & Co.*, 122 Fed. 529. State legislation has been similarly construed, and a consolidation of gas companies has been declared illegal. *People v. Chicago Gas Trust Co.*, 130 Ill. 268. And it was recently decided that the New York law precluded the consolidation of the street railways of the city of New York. *Burrows v. Interborough, etc., Co.*, 156 Fed. 389. The result of the present decision, however, is reached by a few courts which construe similar legislation as applicable only to combinations inimical to public welfare. *Yasoo, etc., Ry. Co. v. Searles*, 85 Miss. 520; see *State v. Central, etc., Ry. Co.*, 109 Ga. 716. But the case would seem to involve a questionable interpretation of legislation which specifies no exceptions to its clear mandate against monopoly.

SALVAGE — SERVICES RENDERED TO SHIP IN DRY DOCK. — The libellants rendered services to a vessel in dry dock by extinguishing a fire communicated to it from buildings on the land. *Held*, that they are not entitled to salvage. *The Jefferson*, 158 Fed. 358 (Dist. Ct., Va.).

The court maintained that fire from the land is not such a danger as to bring the libellants' services under the head of salvage, and that a ship in dry dock is not within the admiralty jurisdiction. In order to entitle rescuers to salvage the danger need not be a peril of the sea. It is well settled that if a ship tied to a wharf is in danger from fire on land, its rescue makes it liable for salvage. *The Kaiser Wilhelm der Grosse*, 106 Fed. 963. On the second point, however, the present case is one of novel impression. An ordinary dry dock is probably not the subject of admiralty jurisdiction, because not capable of navigation. *Cope v. Vallette Dry Dock Co.*, 119 U. S. 625. And it has been held that a ship in dry dock is not subject to a maritime lien for a tort. *The Warfield*, 120 Fed. 847. But the Supreme Court has decided, in an opinion broad enough to cover all maritime claims, that repairs furnished such a vessel are recoverable in admiralty. *Perry v. Haines*, 191 U. S. 17; see 17 HARV. L. REV. 186. This seems the better view, as the ship itself, though temporarily not in process of navigation, may readily be navigated.

TAXATION — EXEMPTIONS — TAXATION OF LESSEE OF COLLEGE PROPERTY. — By the provisions of the charter of a university, certain lands were to be exempt from taxation "as long as said lands belong to said university." The university granted portions of these lands to lessees, whose interests were taxed under a subsequent statute. *Held*, that such taxation is not a violation of the exemption granted by the original charter. *Jetton v. University of the South*, 208 U. S. 489. See NOTES, p. 617.

TAXATION — GENERAL LIMITATIONS ON THE TAXING POWER — STATE TAXATION ON INTERSTATE COMMERCE. — The plaintiff, a New York company, delivered goods in a New Jersey town in its own wagons. An ordinance required a license fee for all vehicles engaged in the transportation of merchandise. *Held*, that the plaintiff's wagons are engaged in interstate commerce and the ordinance is inapplicable. *Simpson-Crawford Co. v. Borough of Atlantic Highlands*, 158 Fed. 372 (Circ. Ct., D. N. J.). See NOTES, p. 618.

TITLE, OWNERSHIP, AND POSSESSION — ARTICLES SUBJECT TO OWNERSHIP — RIGHT TO ARTISTIC CREATIONS. — The plaintiff had several pictorial designs which he intended to copyright and sell for use in advertising. R secretly copied the designs and sold the copies to the defendant, who used them in ignorance of the plaintiff's claims. *Held*, that the defendant is liable in damages as well as subject to injunction. *Mansell v. Valley Printing Co.*, [1908] 1 Ch. 567.

The nature of an inventor's right in his abstract scientific or artistic conception has been the subject of much dispute, but the accepted view is that even before it has been made public in concrete form, he has no absolute property in it. See 20 HARV. L. REV. 143; *Bristol v. Equitable Society*, 52 Hun (N. Y.) 161. A copyright or patent is required to give the originator a legally enforceable right. The communication of the mere idea or design to another deprives the discoverer of nothing which the law can return to him; hence he must enforce his claims in equity. See 17 HARV. L. REV. 206. The protection available in equity is to restrain the disclosure of his secret, or its use, if already disclosed. Use in breach of faith is properly enjoined. *Morison v. Moat*, 9 Hare 241. But when the defendant acquires the knowledge honestly and for value, his conscience cannot be charged, and he should be allowed to enjoy what he has obtained. *Chadwick v. Covell*, 151 Mass. 190. There seems, therefore, no legal or equitable principle upon which to support the present decision. See *Watkins v. Landon*, 52 Minn. 389.

TRADE UNIONS — STRIKES — COMPELLING ACQUIESCENCE TO A UNION BY-LAW. — Six unions of workmen in branches of building trades, affiliated with a central union, ordered out their members on strike because their employers announced an intention to run open shops. There was a by-law of the central union by which grievances of a member of a local union against his employer were to be investigated by the central union, and if the employer did not comply with its decision, his union workmen were not to be allowed to continue at work with him, until he agreed to its demand. The employers of the striking workmen sought to enjoin all the unions from interfering with their business. *Held*, that they are entitled to an injunction. *Reynolds v. Davis*, 84 N. E. 457 (Mass.).

In this case there were probably threats of temporal disadvantage by each union forcing its members to strike. Such action requires a justification. 20 HARV. L. REV. 253, 345 429. The purpose of this strike was to establish the strength of the central union. If that union aimed simply to advance the ordinary principles of unionism, the strike by a single union should be justified. *Ibid.* 434. That this union aimed also to maintain a by-law for the arbitration of disputes by the central union should not destroy the justification if this by-law merely declares the formalities to be gone through before a strike is ordered. The justification fails, however, if damage is intended to be done each employer, not only by the defection of his own employees, but also through his relations with other employers in allied trades. *Pickett v. Walsh*, 192 Mass. 572. While probably this was the situation in the principal case, it is not quite clear that there was more than a merely concurrent attempt by various unions each to advance its own individual interest. Previous Massachusetts cases, however, have not held strikes merely to strengthen the ordinary principles of unionism justified. *Berry v. Donovan*, 188 Mass. 353.

VESTED, CONTINGENT, AND FUTURE INTERESTS — FUTURE INTERESTS IN PERSONALTY — MACHINERY AS A CONSUMABLE CHATTEL. — A general bequest to A for life and at A's death to B absolutely, included presses, type, and an engine, used in a printing establishment. *Held*, that A owns the machinery absolutely, since it is perishable. *Seabrook v. Grimes*, 68 Atl. 883 (Md.).

That a specific bequest of consumable chattels — household provisions, growing and severed crops — for life gives the life tenant the absolute ownership is an established restriction on the creation of future limitations in personality. *Ackerman v. Vreeland*, 14 N. J. Eq. 23. But when they are included in a general or residuary bequest, the testator's intention that the life tenant shall enjoy the specific consumable chattels is not expressed. Consequently the interest of the remainderman controls; the consumable chattels must be converted and the proceeds invested in permanent securities for the remainderman, leaving to the life tenant only the income. This distinction between a specific and a general or residuary bequest, first drawn by the English courts of chancery, is generally accepted in this country. *Healey v. Troppan*, 45 N. H. 243; *Burnett v. Lester*, 53 Ill. 325. The courts of Maryland, however, consistently refuse to

draw the distinction. *Evans v. Iglehart*, 6 Gill. & J. (Md.) 171; *Budd v. Williams*, 26 Md. 265. And the court in the present case also departs from general authority in defining consumable as meaning subject to wear and deterioration. See *Whittemore v. Russell*, 80 Me. 297. As all personalty wears and deteriorates, this definition, taken with the court's refusal to distinguish between specific and general bequests, would always convert life interests in chattels into absolute interests.

WAR — MILITARY PERSONS AS CONTRABAND OF WAR. — During the late Russo-Japanese War the plaintiffs reinsured a ship with the defendants and a clause of the policy warranted against "contraband of war." The ship, with two disguised Russian officers on board and bound for a Russian port, was captured and condemned by a Japanese prize court for carrying "contraband persons." The plaintiffs sued on the policy. *Held*, that the plaintiffs may recover. *Yangtze Ins. Ass'n v. Indemnity, etc., Assurance Co.*, [1908] 1 K. B. 910.

It is settled that a neutral ship carrying persons in the service of one belligerent may be condemned if captured by the other. *The Orosambo*, 6 C. Rob. 430. Likewise a neutral vessel may be condemned for carrying contraband goods, though the usual penalty is confiscation of the objectionable cargo. *The Peterhoff*, 5 Wall. (U. S.) 28. Technically, carrying hostile persons, like the transmission of signals for a belligerent, is unneutral service, and as such service may be rendered anywhere the destination of the neutral ship is immaterial. But as the law of contraband merely regulates trade between neutrals and belligerents, the offense of carrying contraband is consummated only when the destination of the neutral is a belligerent port. MOORE, DIG. INTERNAT. LAW, § 1249. A further distinction appears. For unneutral service the acts of the offending shipmaster form a vital element of the offense, and ignorance will excuse if due care under the circumstances has been used. *The Rapid*, Edw. Adm. 228. For carrying contraband the proceedings are strictly against the neutral's cargo, and ordinarily the acts of the shipmaster are immaterial. In view of these distinctions the decision in the present case, that the facts here did not constitute a breach of the warranty, seems correct.

WITNESSES — PRIVILEGE AGAINST SELF-INCRIMINATION — STATUTORY DUTY TO PERMIT INSPECTION OF BOOKS. — A statute provided that stock-brokers should keep a record of every transaction in relation to transfers of stock and permit a state official to inspect such record, for the purpose of discovering whether a transfer tax had been paid. Failure to pay this tax was made a criminal offense. *Held*, that the statute is unconstitutional. *People v. Reardon*, 39 N. Y. L. J. 171 (N. Y., App. Div., March 1908). See NOTES, p. 601

BOOKS AND PERIODICALS.

I. LEADING LEGAL ARTICLES.

CONTRIBUTORY NEGLIGENCE OF BENEFICIARY UNDER LORD CAMPBELL'S ACT. — None of the American statutes¹ which allow an action for death by wrongful act indicate the effect of the contributory negligence of the beneficiary. When the right of action is given directly to the next of kin as such, the courts without exception construe the statute to provide a remedy conditional on the plaintiff's freedom from contributory negligence.² The result, though un-

¹ See statutes collected in 2 Kinkead, Torts, § 467.

² *Westerberg v. Kinzua, etc.*, R. Co., 142 Pa. St. 471. See 9 HARV. L. REV. 282.

doubtedly commendable from the point of view of public policy, may be criticized as a piece of judicial legislation. It is somewhat comparable to the overruled doctrine that a devisee who murders his testator cannot take legal title under the statute as to wills.³ In that case, however, the just result may be reached without additional legislation by the imposition of a constructive trust;⁴ whereas in the present case the mere unintentional misconduct of the next of kin would hardly prevent him, at law or in equity, from sharing in the deceased's general estate.

A further argument against this construction presents itself — with the result of slightly splitting the authority — when the action for death must be brought in the name of the executor or administrator; for such a provision might indicate the intent of the legislature to furnish a remedy for injury to the estate rather than to the beneficiaries. On the other hand, even under this form of statute, the amount recovered is usually expressly exempted from the debts of the deceased.⁵ Moreover, the generally accepted view is that the remedy is not a survival, but a new cause of action.⁶ The plaintiff-administrator, therefore, even though not himself the beneficiary,⁷ is to be regarded as representing not the deceased, but the next of kin, whether they are designated as beneficiaries or not, and he can have no better rights than those whom he represents. Hence in case of the contributory negligence of the beneficiary the courts cannot consistently refrain from applying the same construction to these statutes as to those which do not require the nominal interposition of a plaintiff-administrator. Consequently here, too, there may not be recovery, if there is contributory negligence, according to the great weight of authority.⁸ It may perhaps be regretted that legislative action has not settled these matters.

From the position taken by the courts, it is no great step to read into the statute that where some of several beneficiaries have been negligent, others not, recovery may be denied to the former and allowed to the latter, all in the one action.⁹ Such a result has been squarely reached only in Ohio, where the wording of the statute as to assessment of damages lends peculiar support to this construction. The question has probably escaped decision in several cases where the court erroneously imputed the contributory negligence of one parent to the other.¹⁰ No such consequence should flow simply from the marital relation, aside from actual delegation of duty.¹¹

The authorities as to some of these points are collected in a recent article by Professor John H. Wigmore. *Contributory Negligence of the Beneficiary as a Bar to an Administrator's Action for Death*, 2 Ill. L. Rev. 487 (March, 1908). The rule is there approved, that regardless of the technical form of procedure designated by the statute, recovery should be refused the negligent beneficiaries and allowed the non-negligent. In states where the doctrine of imputing the negligence of a parent to his child is in force, the cases in which the negligent parent is not allowed a recovery for the child's death cannot be cited in favor of Professor Wigmore's theory. In addition to the jurisdictions cited by him as having nevertheless repudiated this doctrine and as having refused recovery by the administrator for the benefit of the negligent next of kin, five other jurisdictions¹² may apparently be cited. Moreover, in another case not cited,

³ *Riggs v. Palmer*, 115 N. Y. 506.

⁴ See 36 Am. L. Reg. (N. S.) 225.

⁵ But not so in a few states. See *Carlson v. Oregon, etc., R. Co.*, 21 Ore. 450.

⁶ 2 Kinkead, Torts, § 468.

⁷ *Chicago v. Starr*, 42 Ill. 174. *Contra, Wymore v. Mahaska Co.*, 78 Ia. 396.

⁸ *Richmond, etc., R. Co. v. Martin's Adm'r*, 102 Va. 201. *Contra, Warren v. Manchester St. Ry.*, 70 N. H. 352; *Wymore v. Mahaska Co.*, *supra*.

⁹ *Wolf v. Lake Erie R. Co.*, 55 Oh. St. 517. See also *Horton v. Forest City Tel. Co.*, 141 N. C. 455. *Contra, Mill's Adm'r v. Cavanaugh*, 29 Ky. L. Rep. 685.

¹⁰ *Toner's Adm'r v. So. Covington, etc., Co.*, 109 Ky. 41. *Contra, Macdonald v. O'Reilly*, 45 Ore. 589.

¹¹ *Atlanta, etc., R. Co. v. Gravitt*, 93 Ga. 369.

¹² *Ala. G. S. R. Co. v. Burgess*, 116 Ala. 509; *St. L., etc., R. Co. v. Dawson*, 68 Ark. 1; *Mill's Adm'r v. Cavanaugh*, *supra*; *Smith v. Hestonville, etc., R. Co.*, 93 Pa. St. 450. See *Miller v. Meade Tp.*, 128 Mich. 98.

the New York court, not applying the doctrine of imputed negligence, allow a negligent administrator-beneficiary to recover.¹²

RECOVERY OF INTEREST ON ADVANCES BY BROKERS.—Stockbrokers who buy shares for customers on margin almost universally charge them with interest on the amount advanced. In the case of a stringency in the money market the interest so charged is usually in excess of the ordinary legal rate.¹ In a recent article Mr. Harold C. McCullom carefully analyzes the legal relations involved in such transactions in New York, criticizes the theories which have been advanced to sustain the legality of such charges, and defends what he believes to be the correct theory. *Recovery in New York of Interest in Excess of Six Per Cent Paid by Brokers on Money Borrowed to Purchase and Carry Stocks on Margin*, 8 Colum. L. Rev. 281 (April, 1908). Except in the case of call loans, six per cent is the maximum legal rate of interest in New York.² The first theory upon which the broker may seek to sustain his right to recover interest in excess of six per cent is that the money advanced is borrowed by the customer from the bank through the agency of the broker, who has agreed for his principal to pay the call rate of interest.³ Mr. McCullom finds this theory objectionable for several reasons. In the first place the New York decisions have repeatedly regarded the advance as an advance by the broker.⁴ Furthermore, the practice seems to be for the broker to lend his own funds, and, since the banks seldom loan more than eighty per cent of the market value of the stock and the margin required of customers is usually only ten per cent of the market value, the broker is in fact called upon to furnish at least a part of the advance necessary to carry the stock.

The second theory regards the excess of interest as a commission.⁵ This excess cannot be regarded as a commission paid the broker for getting the loan from the bank, since the New York statute fixes the sum that may be charged in such cases at not over fifty cents on one hundred dollars.⁶ It would manifestly be unreasonable to regard this as indemnifying the broker for a commission paid by him to the bank.

The third view is that the advance is really a call loan by the broker to his customer. Mr. McCullom finds that this theory does not fit the case because the New York statute excepting call loans from the usual legal rate applies only to amounts over five thousand dollars and then only when the rate agreed on is in writing.⁷ Moreover, call loans must be payable on demand, whereas it would seem that a stockbroker could not proceed to close out a sale on margin until a reasonable time after giving notice to his customer.⁸

The author believes that the fourth theory presents the fewest difficulties, though he admits that it is not fully sustained by the authorities. This theory regards the excess of interest as reimbursement to the broker for an authorized expenditure actually made in obtaining money to loan to the customer. This expenditure, though not expressly authorized, is authorized by custom. What the broker is here doing is to charge the customer with the actual cost of obtaining the money in the money market. Such a charge has been held not to be usurious if the broker does not recover more than he has paid.⁹ But the broker does not pretend to charge each customer with the exact rate expended in effecting each particular loan. On the contrary, the excess charged is an approximation to the actual expense incurred; for example, by averaging the

¹² *Lewin v. L. V. R. Co.*, 52 N. Y. App. Div. 69.

¹ Dos Passos, *Stockbrokers*, 270.

² N. Y. Laws of 1879, c. 538; *ibid.* of 1882, c. 237, § 1.

³ See *Smith v. Heath*, 4 Daly (N. Y.) 123, 126.

⁴ *Markham v. Jaudon*, 41 N. Y. 235, 240.

⁵ See *Robinson v. Norris*, 6 Hun (N. Y.) 233.

⁶ N. Y. Laws of 1895, c. 467.

⁷ N. Y. Laws of 1882, c. 237, § 1.

⁸ *White v. Smith*, 54 N. Y. 522; *Hess v. Rau*, 95 N. Y. 359.

⁹ *Thurston v. Cornell*, 38 N. Y. 281. *Contra*, *Jackson v. May*, 28 Ill. App. 305.

average daily rates paid by the broker for all loans. If, however, this is a reasonable approximation, there can surely be no legal objection to it.

The conclusion that the broker cannot recover over six per cent unless he has laid out over that amount according to his daily average in procuring the funds which he advances seems entirely correct. In any state where the law permits a call rate there should be no difficulty in applying the author's theory and allowing the broker a recovery.¹⁰ But in no case should the broker recover the cost of borrowing money if he paid a usurious rate.¹¹

BROKERS, RECOVERY IN NEW YORK OF INTEREST IN EXCESS OF SIX PER CENT PAID BY, ON MONEY BORROWED TO PURCHASE AND CARRY STOCKS ON MARGIN. *Harold C. McCollom*. 8 Colum. L. Rev. 281. See *supra*.

CENTRAL AMERICAN PEACE CONFERENCE OF 1907. *James Brown Scott*. 2 Am. J. of Int. L. 121.

COLLEGE FRATERNITY CHAPTER, THE LEGAL STATUS OF A. *Olcott O. Partridge*. Discussing all the rights and liabilities of members and their methods of handling property. 42 Am. L. Rev. 168.

CONTRIBUTORY NEGLIGENCE OF THE BENEFICIARY AS A BAR TO AN ADMINISTRATOR'S ACTION FOR DEATH. *John H. Wigmore*. 2 Ill. L. Rev. 487. See *supra*.

EMPLOYER, THE LIABILITY OF THE. *W. E. Wals*. Maintaining that a proper application of the doctrine of *respondet superior* would make employers' liability legislation unnecessary. 1 Me. L. Rev. 4.

EXPRESS COMPANIES, CAN THEY BE COMPELLED TO MAKE PERSONAL DELIVERY? *George W. Payne*. Collecting authorities. 66 Cent. L. J. 275.

HAGUE CONVENTION RESTRICTING THE USE OF FORCE TO RECOVER ON CONTRACT CLAIMS. *George Winfield Scott*. Including a definition of "contract claims." 2 Am. J. of Int. L. 78.

HAGUE PEACE CONFERENCE, THE WORK OF THE SECOND. *James Brown Scott*. 2 Am. J. of Int. L. 1.

HOSTILITIES, CONVENTION RELATIVE TO THE OPENING OF. *Ellery C. Stowell*. Including a collection of all the cases in which hostilities have been begun without a declaration of war. 2 Am. J. of Int. L. 50.

INTERNATIONAL DIFFERENCES, CONVENTION FOR THE PEACEFUL ADJUSTMENT OF. *Amos S. Hershey*. 2 Am. J. of Int. L. 29.

LABOR UNIONS, RECENT AMERICAN DECISIONS AND ENGLISH LEGISLATION AFFECTING. *Chas. R. Darling*. 42 Am. L. Rev. 200.

MORAL DUTY TO AID OTHERS AS A BASIS OF TORT LIABILITY, THE. I. *Francis H. Bohlen*. 56 U. P. L. Rev. 217.

NEUTRAL POWERS AND PERSONS IN LAND WARFARE, HAGUE CONVENTION CONCERNING THE RIGHTS AND DUTIES OF. *Antonio S. de Bustamante*. 2 Am. J. of Int. L. 95.

PATENT APPEALS, THE PROPOSED COURT OF. *Otto Raymond Barnett*. Pointing out the great advantages of such a court. 6 Mich. L. Rev. 441.

PERMISSIVE WASTE BY TENANTS FOR LIFE OR YEARS. *Geo. S. Holmsted*. Collecting the English and Canadian cases. 44 Can. L. J. 175.

RAILWAY VALUATION — IS IT A PANACEA? *Jackson E. Reynolds*. Contending among other things that the intrastate rates of an interstate railway should be under federal control. 8 Colum. L. Rev. 265.

SURFACE WATER IN CITIES. — THE RIGHTS AND REMEDIES ON PERMITTING, DIVERTING, INCREASING, AND OBSTRUCTING THE NATURAL FLOW. *John R. Reed*. 6 Mich. L. Rev. 448.

UNION LABOR, DISCRIMINATION AGAINST — LEGAL? *Richard Olney*. Contending that the Adair case was wrong in holding unconstitutional a statute forbidding interstate railways from discharging men because of membership in a union. 42 Am. L. Rev. 161. See 21 HARV. L. REV. 370.

UNION PACIFIC RAILROAD COMPANY, THE GOVERNMENT'S SUIT AGAINST THE. *Edson R. Sunderland*. Contending that the remedy for inefficient railway service lies not in prosecution under the Sherman Act, but in regulation. 6 Mich. L. Rev. 361.

VESTED AND CONTINGENT REMAINDERS. *Albert Martin Kales*. Answering a criticism of a former article by Mr. Kales. 8 Colum. L. Rev. 245. See 20 HARV. L. REV. 243.

WAR ON LAND, THE AMELIORATION OF THE RULES OF. *George B. Davis*. 2 Am. J. of Int. L. 63.

¹⁰ *Stevens v. Davis*, 44 Mass. 211.

¹¹ *White v. Ault*, 19 Ga. 551.

II. BOOK REVIEWS.

SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY. By various authors. Compiled and Edited by a Committee of the Association of American Law Schools. In three volumes. Volume I. Boston: Little, Brown and Company. 1907. pp. x, 847. 8vo.

As this book is the first attempt in this country to provide a text-book for the study of legal history, it is fitting, at the outset, to speak of its origin, its motive, and its method of construction, before we discuss the book itself.

It is no doubt true that legal history has felt the uplift in methods of general historical study during the past fifty years. As Professor Beale says in one of these select essays, "The impulse given to legal study by the work of Savigny and his school in the last generation spread over the civilized world and profoundly influenced its legal thought. The Italians, the natural lawyers of the world, have increased their power by adopting his principles. In England a small but important school of legal thinkers has followed the historical method, and in the United States it has obtained a powerful hold. The spirit of the age, here too, has supported it. We are living in an age of scientific scholarship. We have abandoned the subjective and deductive philosophy of the middle ages, and we learn from scientific observation and from historical discovery. The newly accepted principles of observation and induction, applied to the law, have given us a generation of legal scholars for the first time since the modern world began, and the work of these scholars has at last made possible the intelligent statement of the principles of law."¹ As Professor Beale was reading his essay at St. Louis in 1904, Professor Wigmore under the same auspices was reading his paper on "The Problems of Today for the History of the Common Law"² in which he inquired, "What are the methods by which the further investigation of our history can be encouraged and its hitherto attained results be made broadly known and influential in the legal profession? Our inquiry may be stated in two questions: (A) How can we get more history written? and (B) How can we make known what is written?" In considering the second question a third was asked: "What can we do to teach the knowledge of history to students of law and that chiefly, of course, in our schools of law?" As a partial answer to his questions, Professor Wigmore proposed the compilation of a bibliography of material in periodicals and treatises dealing with legal history, the publication of articles to be selected from this bibliography, the translations of leading foreign legal histories, and the requirement that legal history be studied in law schools.

In 1905 at the meeting of the Association of American Law Schools he embodied his ideas in a "Memorial for the Promotion of Historical Study and Research," and offered a resolution that the Association appoint a committee to prepare a series of volumes of Select Legal Essays. In the discussion of the memorial Professor Woodward, in the absence of Professor Wigmore, stated the purport of the memorial as follows: "Professor Wigmore has two thoughts in mind. One is to encourage the study of legal history in the law schools. The other is to make the study of jurisprudence, both in and out of the law schools, easier. With those two aims in view, he makes several recommendations in his memorial, but I think there are only three of them that the Association may be expected to consider at this time. The first is that a committee of scholars shall map out a list of topics now most demanding further research, in order that the younger scholars may be thus supplied with intelligent lines for their ambitions to pursue. . . . Then, with reference to the study of historical jurisprudence in law schools, he says that the materials now existing in the English language must be collected from scattered corners and brought together in a series of accessible volumes. It is practically impossible to set a class of students at work on the material in its present form,

¹ 1 Select Essays in Anglo-American Law, 558, 572.

² See 2 Rep. Congress of Arts and Sciences, 350.

because for the purposes of a large body of students multiply entire sets of the periodicals or copies of rare pamphlets would be required. For the purpose of making these materials accessible, a committee should be appointed to make a list and collate those articles, and, if the Association thinks best, to publish a selection of the most valuable articles of jurisprudence that have heretofore been published in different periodicals and text-books."³

As a result of the discussion of Professor Wigmore's memorial the Association appointed a committee consisting of Professor Wigmore, Professor Ernst Freund, and Professor William E. Mikel, "to investigate the practicability of publishing, under the auspices of the Association, translations of foreign works of legal scholarship and works of original research in legal history and bibliography."⁴

This committee reported to the Association at its meeting in 1906. The report had two main points: first, a resolution (which was adopted) that the Association approve the reprinting of select essays and chapters on various topics of Anglo-American legal history, without pecuniary responsibility to the Association, but at the expense and profit of the publisher, and that a committee be appointed to procure a publisher, to select the essays and obtain permission of authors and copyright holders, when necessary, and to edit the selections and, before making the final selection, to obtain from the respective faculties of schools represented a recommendation of the best sixty titles, to guide the committee in its selection; and, second, it contained a preliminary list of articles from which the compilation might be made. The committee appointed to carry the project into effect was composed of the same gentlemen as that which had formulated the plan, and it went about its duty in the same spirit of scholarly thoroughness. An exhaustive and critical examination of the historical material in legal periodicals, treatises, and works of history resulted in the compilation of a preliminary list of one hundred and fifty titles, and this, after being submitted to the faculties of all the law schools comprised in the Association and to other legal scholars, was finally reduced to sixty select titles for publication.

The preliminary list presents the following features. "(1) It is based on a brief survey of practically all the printed material. (2) It includes only the modern scholarly researches of readable interest and of general reference value to students. (3) It does not attempt (with rare exceptions) to include anything from the few professed treatises on the history of the law. (4) It includes essays on almost all the main subjects of the law from corporations to liens, and covers also the general field of sources of the law, law reform in the nineteenth century, and colonial law. (5) It forms substantially a supplement to Pollock and Maitland's *History of English Law*. The selections conform closely to Professor Wigmore's opinion that, in dealing with the history of English private law, all works written before 1881 may be ignored; for, of the one hundred and fifty titles selected, only twelve are dated before 1881, and none is earlier than the letter of Chancellor Kent, dated 1828. It is to be noted, however, that less than half of the articles finally selected for printing in this first volume were in the preliminary list. It has seemed desirable to set forth in some detail the facts connected with the inception of this important undertaking in order that the periodical which has contributed so materially to the contents of the work may preserve in its pages a permanent record of the enlightened and unselfish labors of the scholars to whom we owe it.

In view of the fact that the volume before us comprises only one-third of the material to be embodied in the completed work and that the full list of the selections has not been announced, a criticism of the work as a whole, or even of the introductory book, would be premature. Indeed, this book, consisting of twenty-one titles, grouped in five divisions under the description of "General Surveys," unavoidably presents itself in a somewhat fragmentary aspect. It covers an enormous range in subject-matter as well as in time—from the *Leges Barbarorum* to the Victorian period, from the judicial procedure of Edward I to the expansion and reform of the law in the nineteenth century.

³ 28 Rep. Am. Bar Ass'n, 680 (1905).

⁴ 26 *ibid.* 679, 703.

We seem, therefore, to have rather the *disjecta membra* of legal history than an orderly sequence of events.

It should be said, however, that this defect of the work in no way is due to lack of scholarly judgment or of careful arrangement on the part of the editors. It is hard to see how, under the plan adopted, better selections could have been made or the matter more judiciously presented. But the editors had to take what they could get, and the paucity of material available for their purpose as well as the plan and scope of the work rendered such a result inevitable. It may reasonably be expected that the succeeding volumes will display a greater degree of coherence and solidity, though they too must suffer from the dearth of historical scholarship in our Anglo-American world.

In the meantime the appearance of the distinguished names of Maitland, Pollock, Stubbs, and Holdsworth among the contributors to the first volume demonstrates that the work will offer to the law student the best that our legal scholarship has yet produced in the field of history.

But if the volume under review is not to be taken as, in all respects, a measure of the entire work, one thing at least it makes clear. It is evident that we are to have history and not the materials of historical study; a book for the reader rather than for the serious student. In his report of 1906, previously referred to, Professor Wigmore says: "In short, what is needed is a handy and inexpensive series of select essays which shall do for this part of legal study exactly what the case-book has done for the study of cases." Now, whatever may be "needed" by the student of legal history (and it is not likely that the need will soon be met), is it true that this collection of historical essays, however learned and however readable they may be — and they are both learned and readable — will do for the student in this field what his cases have done for him in his professional study of law? The analogue of the case-book is not the historical essay, which gives in agreeable and persuasive form the results of another's study, but a collection of the raw material to which the essayist himself was compelled to resort, and this raw material is nothing but the cases and statutes in which the history of the law is written. Whether it would be possible to compile and bring within a moderate compass enough material of this sort to equip the student for the study of our legal history is a question which, fortunately, we need not attempt to answer here; but let us entertain no illusions as to the real function of the "Select Essays." They will serve a sufficiently useful purpose in teaching our young men and, happily, some of those who have grown gray in the service of the law, to find delight as well as instruction in the marvelous story of our legal development. N. A.

THE AMERICAN GOVERNMENT, ORGANIZATION AND OFFICIALS, WITH THE DUTIES AND POWERS OF FEDERAL OFFICE-HOLDERS. By H. C. GAUSS. New York: L. R. Hamersley and Company. 1908. pp. xxiii, 871. 8vo.

This book will prove a useful compendium for students and, as well, for men of affairs. It is not a formal treatise on government nor on administrative law, but it is a presentation in a concise manner of the essential facts pertaining to our system of government indexed so as to be easily available to all readers. After a chapter devoted to the principles of the governmental system of the United States the author takes up by chapters the President, Congress, and the Supreme Court of the United States. Then follow chapters devoted to the officers of Congress — the Vice-President and the Speaker of the House, and subordinate officials. Following these is a chapter on the officials of the executive departments, the Secretaries and Assistant Secretaries. Chapter 7 treats in detail of the judiciary and the various functions of the federal and territorial courts. To each also of the principal executive departments a chapter is devoted.

In that chapter relating to the Treasury Department some inaccuracies are noted. For example, in discussing the customs law, the author says (p. 318) that in certain cases collectors of customs may call in merchants to appraise imported goods. This is an error. The old "Merchant Appraiser" system, as it was called, was repealed by the present Customs Administrative Act of 1890. Furthermore the word "protest" is used by the author with reference to

notices of dissatisfaction, filed by importers, with the appraisal of goods by the local appraisers. The word "protest" is a technical term applying only to protests against the rate of duty as fixed by the collector; the term is not applicable to requests for reappraisal.

On page 319 the author says that an owner dissatisfied with a reappraisalment of the Board of General Appraisers can have a further appeal to a board of three general appraisers. This appeal is not an appeal from the Board of Appraisers, however, but is an appeal from the decision on valuation of a single member of the Board.

The author also states that there is a further appeal on reappraisements to the Circuit Court of Appeals. This is an error. Appeals to the Circuit Court of Appeals are allowed only on questions pertaining to the rate of duty, such questions being raised by protest against the decision of the collector. From these protests there is an appeal to a board of three general appraisers and from that board to the Circuit Court of the United States. There is no appeal on reappraisements from the decision of the board of three general appraisers.

On page 426, in discussing national bank notes, the author states that these notes are legal tender. This is an error. While the notes are received at par by the United States, except for duties on imports, and while they are available for payment by the United States except for interest on the public debt and the redemption of the national currency, they are not legal tender.

The statement is also made that approved bonds other than those of the United States have been accepted and are deposited in the Treasury as a guaranty of national bank circulation by those who have the privilege of issuing national bank notes. The author here has fallen again into error. Under the law, no national bank notes can be or ever have been, issued, except on the security of United States government bonds. What the author has in mind is evidently the practice — wholly illegal, at least prior to the recent Act of 1907, although resorted to by Secretary Shaw prior to that Act — of making deposits of government money with national bank depositories, taking therefor securities other than United States government bonds.

On page 23 the author states that cabinet officers succeeding to the office of President of the United States in case of vacancies in the office of President and Vice-President, are to complete the terms in which the vacancies exist. This also seems to be an error. While under the recent act designating cabinet officers to fill the office of President provisions of the old law requiring a special election of President were abolished, yet the debates on the passage of the new law show clearly that the provision alluded to by the author that the new President must call Congress in session within twenty days, was enacted in order that Congress might then determine whether or not to order a special election or to permit the cabinet officer to serve out the term in which the vacancy occurred.

In spite of these and some other inaccuracies of statements, the book, as stated, will prove a useful work and is well worth the perusal of students of government.

C. S. H.

COLONIAL LAWS AND COURTS. Edited by Alexander Wood Renton and George Grenville Phillimore. Reprinted from Burge's Commentaries on Colonial and Foreign Law. London: Sweet and Maxwell, Ltd. Boston: The Boston Book Company. 1907. pp. xxxi, 420. 8vo.

This volume is a republication of the first or introductory volume of Burge's Commentaries on Colonial and Foreign Laws, and with the exception of the introductory chapters is rather a book of reference than for the general reader.

A brief sketch of the existing system of the laws of England, Scotland, Wales and Ireland, the common and canon law, is followed by a sketch of the law of France, French customary law and the modern codes, the law of the Netherlands, Belgium, Spain, Italy and all other European countries, the United States, and the South American Republics.

The authors are evidently believers in codification; for they say that to Georgia belongs the credit of first adopting a code of substantive law in 1860. Their statement that the common law as it exists in England was never enforced in all its provisions in any state is a little misleading (p. 38). For, with the ex-

ception of primogeniture and feudal tenures, it was enforced in many of the colonies, and is still expressly recognized in the constitution and statutes of most states. In fact, many even of the English statutes enacted prior to the fourth year of James I — as in New York and Maryland, the statutes enacted and adopted before July 4, 1776 — are part of the state law.

And it is putting it quite too strongly to say that what is common law in one state, is not in another. The reverse statement would be nearer the truth. When, too, in speaking of the states of the Union, the statement is made that the Code Napoleon has influenced the laws of Texas and Hayti, the reference to the latter country is misleading; as is the list of nearly forty states said to possess codes; for many of these are mere revisions of general statutes, in no sense complete codifications of the law like the code of California.

The bulk of the book is taken up with the laws of the colonies, of foreign nations, and their juridical constitutions. Thus, Chapter Two is given to the laws of the Empire of India; Chapter Three to the Roman-Dutch laws in Holland and the Dutch Colonies, the laws of Ceylon, South Africa, and British Guiana. Part Two is given entirely to the juridical constitutions of the British dominions outside of Great Britain. Part Three is taken up with matters of appeal to the Privy Council, showing in greatest detail the conditions upon which an appeal is allowed from British courts of justice outside of the United Kingdom.

F. J. S.

ELEMENTS OF THE LAW OF BAILMENTS AND CARRIERS. By Philip T. Van Zile. Second Edition. Chicago: Callaghan & Company. 1908. pp. lxxiii, 856. 8vo.

Six years ago the first edition of this work was the subject of review. See 15 HARV. L. REV. 869. At that time it was said: "It is likely to prove particularly a student's book. It will nevertheless become a valuable book for practitioners from its concise analysis of an important subject." The publication of a second edition within relatively so short a time justifies the prediction of the reviewer.

A careful examination of the new edition shows that the author has rewritten much of the work, thereby greatly improving the form of statement. The division into chapters remains practically the same. There are but six sections more in the second edition than in the first; these are accounted for by the insertion of §§ 623-628 dealing with the liability of carriers for injury to servants caused by the negligence of fellow servants. The other sections are not, however, the same as in the first edition, the analyses and division of subject-matter being changed. Chapter XI has been almost wholly rewritten; and the law governing warehousemen has been stated more at length and with greater particularity.

Recent cases of importance have been incorporated, citation being now made to nearly 4000 cases. There is a good table of contents, and a serviceable analytic index, which has been enlarged by the addition of many new titles, and the expansion of a number of old ones, particularly that on connecting carriers. Taken all in all, the new edition is an improvement on what was a useful book, and it warrants the labor of the author and the publisher.

S. H. E. F.

MILITARY LAW AND THE PROCEDURE OF COURTS MARTIAL. By Edgar S. Dudley. London: Chapman and Hall, Ltd. New York: John Wiley and Sons. 1907. pp. ix, 650. 12mo.

The aim of this treatise, as the author states in his preface, is "to meet the existing necessity at the United States Military Academy for a text-book which would give a clear and thorough outline of the science of military law, including all recent changes and developments, and yet be contained within such brief compass as to be adapted for use in the instruction of Cadets within the limited period assigned to the study of the subject." In this aim the author has succeeded admirably. Critics will say, and say truly, that the work is in large measure but a new edition of the long line of earlier treatises, and particularly

of General Davis' classic work on military law. Such critics, however, often lose sight of the fact that no branch of the common law admits of less originality and breadth of treatment than that dealing with the various phases of military law. Although Colonel Dudley's field of work has narrow bounds, he has produced within them a remarkably clear, concise, and accurate statement of the law; the book will surely find its place upon the shelves of many lawyers as well as of many soldiers as a convenient manual for instant information upon subjects within its scope.

J. J. R.

FEDERAL USURPATION. By Franklin Pierce. New York: D. Appleton and Company. 1908. pp. xx, 437. 8vo.

Mr. Franklin Pierce of the New York Bar properly describes his "Federal Usurpation" as "a plea for the sacredness of the Constitution." Mr. Pierce's idea is not that the Constitution, framed one hundred and twenty years ago, is adequate for our existing political needs. On the contrary, he believes that its system of checks and balances adopted from distrust of the people prevents the beneficent expression of popular will in legislative and executive action, and should be radically modified by amendments to the Constitution. But in the idea championed by President Roosevelt and Secretary Root, that the power of the central government should be quietly and unobservedly increased "through judicial interpretation and construction of law," he sees the gravest danger. The book is mainly devoted to pointing out specific instances of unwarranted assumptions of power by different branches of the government, as against each other and against the states. The author suggests constitutional changes to lessen the temptation to usurpation, the chief of which is the facilitation of amendment so that the Constitution could be remodelled to suit the changed condition of the Republic.

Mr. Pierce writes in a clear, direct fashion, with an earnest detachment of view which highly commends his work to the student of public affairs rather than to the "politician." It is to be regretted that he does not seem to accord to sound judicial interpretation — along with popular agitation — the place which it must necessarily occupy in the development of a written constitution; and that he is hasty in his views of some troublesome subjects, as, for example, trusts, of which he would have the states "make short work." A. A. B.

THE LAWS OF ENGLAND. By the Right Honorable the Earl of Halsbury, Vol. I. London: Butterworth and Company. Philadelphia: Cromarty Law Book Company. 1907. pp. ccxviii, 647 (68). 8vo.

THE JOURNAL OF DEBATES IN THE CONVENTION WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES, 1787, as recorded by James Madison. Edited by Gaillard Hunt. In two volumes. New York and London: G. P. Putnam's Sons. 1908. pp. xvii, 392; vi, 461. 8vo.

A TREATISE ON THE INCORPORATION AND ORGANIZATION OF CORPORATIONS. By Thomas Gould Frost. Third Edition. Boston: Little, Brown and Company. 1908. pp. xv, 909. 8vo.

THE CORPORATION MANUAL. Edited by John S. Parker. Fifteenth Annual Edition, 1907-1908. New York: Corporation Manual Company. 1908. pp. xiii, 1816. 8vo.

REPORT OF THE THIRTIETH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION. Held at Portland, Maine, August 26, 27 and 28, 1907. Baltimore: The Lord Baltimore Press. 1907. pp. 1266. 8vo.

DIE GESICHTE DES ENGLISCHEN PFANDRECHTS. By Harold Dexter Hazeltine. Breslau: M. & H. Marcus. 1907. pp. xxviii, 372. 8vo.

FUNERALI. By Mario Ricca-Barberis. Milan: Società Editrice Libreria. 1906. pp. xxiii, 204. 8vo.

TRUE STORIES OF CRIME. By Arthur Train. New York: Charles Scribner's Sons. 1908. pp. vii, 406. 8vo.

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